(10)

Supreme Court, U.S.
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No. 03-814

In The Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

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May 24, 2004

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Petition For Certiorari Filed December 3, 2003
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Relevant Docket Entries

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:95-cv-11046-RCL

Filing Date	#	Docket Text
05/19/1995	1	Complaint filed. Case assigned to Judge: Lindsay. Receipt #: none Amount: $ waived. (fmr) (Entered: 05/23/1995)
06/09/1995	3	Answer by Dutra Construction to complaint; jury demand, filed c/s. (fmr) (Entered: 06/09/1995)
09/10/1996	14	Motion by Willard T. Stewart for leave to file amended complaint, filed. (sat) (Entered: 09/11/1996)
		* * *
09/12/1996	17	Amended complaint by Willard T. Stewart filed. (Answer due 9/22/96 for Dutra Construction). Amended complaint amends [1-1] complaint. (sat) (Entered: 09/12/1996)
09/16/1996	18	Motion by Dutra Construction for summary judgment, filed; c/s. (sat) (Entered: 09/16/1996)
09/16/1996	19	Memorandum by Dutra Construction in support of [18-1] motion for summary judgment, filed; c/s. (sat) (Entered: 09/16/1996)
		* * *
10/02/1996	22	Response by Willard T. Stewart in opposition to [18-1] motion for summary judgment, filed; c/s. (sat) (Entered: 10/03/1996)

10/18/1996 23 Supplemental Motion by Dutra Construction for summary judgment, filed c/s. (lmh) (Entered: 10/18/1996)

10/18/1996 24 Supplemental Memorandum by Dutra Construction in support of [23-1] motion for summary judgment, filed c/s. (lmh) (Entered: 10/18/1996)

* * *

12/03/1996 28 Answer by Dutra Construction to amended complaint, filed.; jury demand; c/s. (sat) (Entered: 12/03/1996)

* * *

02/06/1997 30 Suggestion of bankruptcy by Dutra Construction, filed; c/s. (sat) (Entered: 02/06/1997)

* * *

02/10/1997 32 Judge Reginald C. Lindsay. Procedural Order entered. In order to avoid the necessity for counsel to appear at periodic status conference, the Court enters the following Administrative Order: The above-captioned case is dismissed without prejudice to either party moving to restore it to the docket, upon final determination of bankruptcy proceedings, by filing an appropriate motion. Entered cc/cl (lau) (Entered: 02/10/1997)

* * *

06/17/1998 36 Judge Reginald C. Lindsay. Clerk's Notes: re: status conference; plaintiff moves to restore this case to the docket-motion allowed. Case to be reopened. Counsel report that there is a motion for summary judgment pending. Only

remaining discovery has to do with experts depositions; depositions to be held once the summary judgment has been decided, if necessary. Counsel to check with their clients to see if they agree to mediation. (lau) (Entered 06/18/1998)

* * *

03/26/1999 42 SUPPLEMENTAL Memorandum of law by Willard T. Stewart re: Contra Defendant's motion for summary judgment, filed; c/s. (sat) (Entered: 03/26/1999)

03/29/1999 43 Judge Reginald C. Lindsay. Clerk's Notes: re: motion hearing held. After oral argument, court ruled from the bench, granting [18-1] motion for summary judgment, and denying [23-1] motion for summary judgment, all for reasons stated on the record. Court Reporter: Teri Gibson (sat) (Entered: 03/30/1999)

* * *

04/19/1999 45 Notice of appeal by Willard T. Stewart filed. Appeal record due on 5/19/99 (lau) (Entered: 04/20/1999)

* * *

06/09/1999 47 Motion by Willard T. Stewart to stay pending appeal, filed; c/s. (sat) (Entered: 06/09/1999)

* * *

06/15/1999 49 Response by Dutra Construction in opposition to [47-1] motion to stay pending appeal, filed. (seh) (Entered: 06/16/1999)

* * *

10/06/1999	56	Motion by Willard T. Stewart for rehearing, filed. (sat) Modified on 10/27/1999 (Entered: 10/06/1999)
		* * *
10/26/1999	61	Response by Dutra Construction in opposition to [56-1] motion for rehearing, filed; c/s. (sat) (Entered: 10/27/1999)
		* * *
12/17/1999		Judge Reginald C. Lindsay. Endorsed Order entered denying [56-1] motion for rehearing. [EOD Date 12/21/99]. Copy sent to counsel on 12/21/99. (sat) (Entered: 12/21/1999)
		* * *
01/05/2000	65	Notice of appeal by Willard T. Stewart filed. Appeal record due on 2/4/00 (sat) (Entered: 01/06/2000)
		* * *
11/21/2000	69	Opinion of the Court of Appeals re: [65-1] appeal, [45-1] appeal, entered. (jr) (Entered: 11/21/2000)
11/29/2000	70	Mandate of US Court of Appeals re: [65-1] appeal, [45-1] appeal affirming the judgment of the district court. (jr) (Entered: 11/29/2000)
		* * *
11/05/2001	81	Motion by Dutra Construction for RENEWED summary judgment on all remaining counts, filed; c/s. (sat) (Entered: 11/06/2001)
11/05/2001	82	Memorandum by Dutra Construction in support of [81-1] motion for RENEWED

		summary judgment on all remaining counts, filed; c/s. (sat) (Entered: 11/06/2001)
		* * *
02/08/2002	88	Response by Willard T. Stewart in opposition to [81-1] motion for RENEWED summary judgment on all remaining counts, filed; c/s. (sat) (Entered: 02/08/2002)
		* * *
05/21/2002		Judge Reginald C. Lindsay. Endorsed Order entered granting [81-1] motion for RENEWED summary judgment on all remaining counts.... Motion allowed based on the application of Morehead v. Atkinson-Kiewit, 97 F.3s 603 (1st Cir. 1996) to the undisputed facts of record in this case. [EOD Date 5/21/02]. Copy sent to counsel on 5/21/02. (sat) (Entered: 05/21/2002)
05/21/2002	90	Judge Reginald C. Lindsay. Judgment on all counts entered for Dutra Construction against Willard T. Stewart. [EOD Date 5/21/02]. Copy sent to counsel on 5/21/02. (sat) (Entered: 05/21/2002)
05/21/2002		Case closed. (sat) (Entered: 05/21/2002)
05/30/2002	91	Notice of appeal by Willard T. Stewart filed. Appealing: [90-1] judgment order. Appeal record due on 6/14/02 (kf) (Entered: 05/31/2002)
		* * *
09/30/2003	92	MANDATE of USCA as to [91] Notice of Appeal filed by Willard T. Stewart; This cause came on to be heard on appeal from the United States District Court for

the District of Massachusetts, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district Court's grant of summary judgment is affirmed. (Ramos, Jeanette) (Entered: 09/30/2003)

* * *

U.S. Court of Appeals for the First Circuit
No. 99-1487

4/27/99	CIVIL CASE docketed. Notice filed by Appellant Willard Stewart. [99-1487] (eiln) [99-1487]
	* * *
3/15/00	BRIEF filed by Appellant Willard Stewart in 99-1487. Pages: 44, Copies: 9, delivered by mail. Certificate of service date 3/15/00. [462726-1] Appellee brief due 4/14/00. [99-1487] (eiln) [99-1487]
3/15/00	APPENDIX filed by Appellant Willard Stewart in 99-1487. Copies: 5. Volumes: 1. Delivered by mail, filed. Certificate of service date 3/15/00 [462727-1] [99-1487] (eiln) [99-1487]
4/14/00	BRIEF filed by Appellee Dutra Construction in 99-1487, Appellee Dutra Construction in 00-1090. Pages: 31, Copies: 10, delivered by hand. Certificate of service date 4/14/00. [465855-1] Reply brief due 4/28/00 in 99-1487, in 00-1090. [99-1487, 00-1090] (lina) [00-1090 99-1487]
	* * *
4/14/00	DISCLOSURE STATEMENT on behalf of Appellee Dutra Construction filed. [99-1487] (lina) [99-1487]
4/17/00	PETITION filed by Appellant Willard Stewart in 99-1487, and 00-1090 Petition for initial hearing en banc. Certificate of Service dated 4/17/00. [99-1487, 00-1090] (eiln) [00-1090 99-1487]
	* * *

6/14/00 ORDER filed by Chief Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Michael Boudin, Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez denying petition request for hearing enbanc. [99-1487, 00-1090] in 99-1487, 00-1090 (eiln) [99-1487]

6/14/00 ORDER filed by Chief Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Michael Boudin, Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez denying petition request for hearing enbanc. [99-1487, 00-1090] in 99-1487, 00-1090 (eiln) [99-1487]

* * *

9/7/00 CASE ARGUED 09/07/00. Selya, Bownes, Stahl, JJ. (ceca) [00-1090 99-1487]

10/31/00 OPINION issued by Selya, Circuit Judge, Bownes, Senior Circuit Judge, and Stahl, Circuit Judge. Signed Judge Bruce M. Selya, Authoring Judge. PUBLISHED [511310-1] [99-1487, 00-1090] (turn) [00-1090 99-1487]

10/31/00 JUDGMENT entered closing case. The judgment of the district court is affirmed. [511315-1] [99-1487, 00-10901 (turn) [00-1090 99-1487]

* * *

No. 00-1090

1/28/00 ORDER filed to consolidate for purposes of briefing and oral argument the following cases: 99-1487. [00-1090] (eiln) [00-1090]

* * *

———

No. 02-1713

6/12/02 CIVIL CASE docketed. Opening forms sent. Notice filed by Appellant Willard Stewart. Appearance form due 6/26/02. Docketing Statement due 6/26/02. Transcript Report/Order due 6/24/02. Fee due 6/26/02. [02-1713] (mlyn)

6/12/02 RECORD filed: Pleading included: 1-91. No Transcript(s) filed. [663149-1] [02-1713] (mlyn)

* * *

11/15/02 BRIEF filed by Appellant Willard Stewart. Length: 7,404 words, Copies: 9, delivered by hand. Certificate of date 11/15/02. [703492-1] Appellee brief due 12/16/02. brief due 12/30/02. [02-1713] (mlyn)

* * *

11/15/02 APPENDIX filed by Appellant Willard Stewart. Copies: 5. Volumes: 1. Delivered by hand, filed. Certificate of service date 11/15/02. [703494-1] [02-1713] (mlyn)

12/16/02 DISCLOSURE STATEMENT on behalf of Appellee Dutra Construction filed. [02-1713] (mlyn)

* * *

1/17/03 ORDER filed by Judge Juan R. Torruella, Judge Sandra L. Lynch, Judge Jeffrey R. Howard. Upon consideration of motion, It is hereby granted that appellant's reply brief be accepted for filing this day. [02-1713] (mlyn)

1/17/03 REPLY BRIEF filed by Appellant Willard Stewart. Length: 6 pgs, Copies: 8, delivered

by hand. Certificate of service date 1/15/03. [718483-1] [02-1713] (mlyn)

* * *

9/4/03 JUDGMENT filed Judge Juan R. Torruella, Judge Sandra L. Lynch, Judge Jeffrey R. Howard. This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's grant of summary judgment is affirmed. [785881-1] [02-1713] (mlyn)

9/4/03 OPINION: Judge Juan R. Torruella, Judge Sandra L. Lynch, Judge Jeffrey R. Howard. Signed Judge Juan R. Torruella. PUBLISHED. [785884-1] [02-1713], (mlyn)

* * *

12/12/03 U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on 12/3/3. Supreme Court case number: 03-814. [02-1713] (darl)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLARD T. STEWART Plaintiff, v. DUTRA CONSTRUCTION CO., INC. Defendant.	)	CIVIL ACTION NO. 95-11046 (RCL)

AMENDED COMPLAINT
JURY TRIAL DEMANDED

(Filed Sept. 12, 1996)

FIRST CAUSE OF ACTION

Plaintiff hereby claims of the defendant a sum in excess of One Hundred Thousand Dollars ($100,000.00) in damages upon the following causes of action:

1. Plaintiff is a seaman.

2. This action is brought pursuant to the Maritime Law of the United States as modified by the Jones Act, 46 U.S.C. §688, *et seq*.

3. At all times material hereto, defendant, Dutra Construction Company, Inc., was doing business at 347 Congress Street, Suite 204, Boston, Massachusetts.

4. At all times material hereto, plaintiff was in the employ of the defendant as a member of the crew of defendant's #4 scow to the dredge "SUPER SCOOP" at the rate of pay and for the terms as set forth in his contract of employment.

5. On or about July 15, 1993, while the said scow and dredge were in Boston Harbor, Boston, Massachusetts, plaintiff suffered injuries while under the employment of defendant.

6. Plaintiff's injuries were caused by the negligence of the defendant, by its agents, servants, workmen and employees, by the unseaworthiness of the scow and dredge, and by the defendant's breach of its obligations under the circumstances.

7. Solely by reason of the negligence of the defendant, plaintiff sustained personal injuries.

WHEREFORE, plaintiff demands judgment against the defendant in excess of the sum of One Hundred Thousand Dollars ($100,000.00), with costs and interest, and brings this action to recover same.

SECOND CAUSE OF ACTION

In Admiralty

Plaintiff claims of defendant maintenance and cure and wages in such amount as may be determined by the Court upon the following cause of action:

8. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 7 inclusive of this complaint, with the same force and effect as if fully set forth and repeated herein.

9. Plaintiff, by virtue of his services upon the said scow and dredge, claims maintenance and cure and wages for the period off this disability in an amount which to your Honorable Court shall deem just and proper upon the trial of this cause.

10. All and singular, the premises contained herein are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, plaintiff prays that judgment be entered against the defendant for such maintenance and cure and wages as the court may determine to be due and owing upon the trial of this cause, and for such interest, costs, and counsel fees as the court may deem just and proper.

THIRD CAUSE OF ACTION

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 10 inclusive of this Complaint, with the same force and effect as if fully set forth and repeated herein.

12. Jurisdiction herein arises under the Longshore and Harbor Workers' Compensation Act Amendments of 1972. Public Law No. 92576, §18(a), 86 Stat. 1263, 33 U.S.C. §905 amending §5 of the Longshore and Harbor Workers' Compensation Act, Ch. 509, §5, 44 Stat. 1426, 33 U.S.C. §905 (LHWCA).

13. Plaintiff's injuries were caused by the negligence of the defendant, its agents, servants, and/or employees and/or ostensible agents, servants, and/or employees and/or the unseaworthiness of the "SUPER SCOOP" in the following respects, including but not limited to:

(a) failing to provide a safe place for plaintiff to perform his duties;

(b) failing to provide plaintiff with proper, safe, seaworthy, and/or adequate vessel appliances, gear, appurtenances, and/or equipment;

(c) failing to properly and adequately inspect, maintain, and/or repair the vessel's gear, lines, shackles, deck, and/or appurtenances in a safe and seaworthy condition;

(d) failing to warn plaintiff and/or his co-workers of a defective, dangerous, and/or hazardous condition of the vessel's gear, lines, shackles, deck, and/or appurtenances when defendant knew or should have known of such condition;

(e) failing to inspect, remove, remedy, and/or correct a defective, dangerous, and/or hazardous condition when defendant knew or should have known of its existence;

(f) failing to discover, in the exercise of reasonable care, a defective, dangerous, and/or hazardous condition of the vessel;

(g) permitting a defective, dangerous, and/or hazardous condition to exist;

(h) failing to take proper and necessary precautions and/or steps to prevent injury;

(i) failing to comply with governmental and/or other applicable safety regulations;

(j) failing to observe safe boating methods, practices, and/or procedures during the boom-jump operation;

(k) failing to properly remove, store, clean, and/or clear poly bags, trash, and/or other items from all boat deck working surfaces;

(l) failing to properly and adequately coat the boat decking surface with anti-slip and/or other non-skid materials;

(m) failing to use due care under the circumstances and being otherwise negligent under defendant's rules, regulations, customs, and/or practices; and

(n) otherwise being careless, reckless, and/or negligent in the maintenance and/or operation of the vessel.

14. The injuries in question were caused solely by the negligence of defendant, its agents, servants, and/or employees and/or ostensible agents, servants, and/or employees and were due in no manner to any act and/or omission on the part of plaintiff.

15. As a direct and proximate result of the negligence of defendant, plaintiff has suffered, and will in the future continue to suffer, pain and hardship, loss of income, medical expenses, and an inability to perform his usual duties.

WHEREFORE, plaintiff demands judgment against the defendant in excess of the sum of One Hundred Thousand Dollars ($100,000.00), with costs and interest, and brings this action to recover same.

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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff	)	CIVIL ACTION NO. 95-11046-RCL
Vs.	)	
DUTRA CONSTRUCTION CO., INC., Defendant	)	

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S, MOTION FOR SUMMARY JUDGMENT

(Filed Sept. 16, 1996)

Now comes the defendant, Dutra Construction Co., Inc. and asks the Court to grant it Summary Judgment on all counts. As grounds, therefore, the defendant argues that there is no genuine issues of material fact and the defendant is entitled to a judgment as a matter of law. Specifically, the Court should find as a matter of law that the plaintiff is not a seaman within the meaning of the Jones Act (46 U.S.C. 688) and has no standing to bring a claim pursuant to the Jones Act or the doctrine of maintenance and cure.

The plaintiff has recently filed a motion for leave to amend complaint to add a count under Section 905B of the Longshore and Harbor Workers' Compensation Act. It is the defendant's position that as a matter of law the plaintiff is not entitled to Section 905B benefits. The defendant reserves the right to supplement its Motion for Summary Judgment if the Court allows the plaintiff to amend its complaint.

In support of this Motion, the defendant refers to and incorporates herein the attached Memorandum of Law, relevant portions of the transcript of the plaintiff's deposition and the Complaint.

"REQUEST FOR ORAL ARGUMENT"

The defendant believes that oral argument will assist the Court in deciding this matter and therefore requests to be heard.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 12th day September, 1996 served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

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/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff	)	CIVIL ACTION NO. 95-11046-RCL
Vs.	)	
DUTRA CONSTRUCTION CO., INC., Defendant	)	

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S, MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The defendant, Dutra Construction Co. ("Dutra"), asserts that no genuine issues of material fact exist in this case, and submits the following memorandum in support of its Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c).

I. CONCISE STATEMENT OF MATERIAL FACTS OF RECORD AS TO WHICH IT IS CONTENDED THAT THERE EXIST NO GENUINE ISSUE TO BE TRIED

The plaintiff, Willard Stewart ("Stewart") was injured on July 15, 1993 while employed by Dutra. Stewart was hired to work on the dredge Superscoop. Ninety-nine percent of his time while on the job was on the Superscoop

(Stewart Deposition Transcript at 33, Ex "A").[1] Dutra was hired to perform drilling, blasting and dredging for an immersed tube tunnel (later to be christened the Ted Williams Tunnel). This was the first time Stewart had worked for Dutra (S. Tr. at 28, Ex "A"). The plaintiff was hired as an engineer (S. Tr. at 34, Ex "A").

The Superscoop is a dredge (S. Tr. at 31, Ex "A") which does its digging with a clamshell bucket (S. Tr. at 31, Ex "A"). The Superscoop's only form of propulsion was its anchors and cables (S. Tr. at 35, Ex "A"). The Superscoop does not have a propeller. (*Id.*) While on the job, over a twelve hour period, the Superscoop would be moved six times and the average move was between thirty and fifty feet (S. Tr. at 35, Ex "A"). Each move would take approximately five Minutes. (*Id.*) The remainder of the time the Superscoop would be in one location for dredging (S. Tr. at 36, Ex "A"). While dredging, the Superscoop would be secured by four anchors. (*Id.*)

The Superscoop did not contain sleeping quarters. The workers were brought to shore after each shift by a work boat (S. tr. at 32, Ex "A"). The plaintiff was living in East Boston (S. Tr. at 38, Ex "A").

At the time the plaintiff was injured, he was on Scow #4 working on the wiring (S. Tr. at 53, Ex "A"). The Scow was tied up along side the Superscoop. The Scow was out of commission and no dredging had been done that day (S. Tr. at 49, Ex "A"). The engine on the scow that controlled

[1] The deposition transcript of Willard Stewart shall herein after be referred to as "S. Tr."

the hopper had been replaced (S. Tr. at 45, 46, Ex "A"). The plaintiff was not wearing a life vest (S. Tr. at 65, Ex "A").

In his complaint, the plaintiff alleges that his injuries were caused by the negligence of the defendant, its agents, servants, workmen and employees, by the unseaworthiness of the dredge, and by the defendant's breach of its obligations under the circumstances (Stewart Complaint, Ex "B").

Stewart brought suit against his employer, Dutra Construction Co. pursuant to the Jones Act, 46 U.S.C. §688 *et seq* and the doctrine of maintenance and cure. (*Id.*) The plaintiff alleges that he was a member of the crew of defendant's dredge "Superscoop". (*Id*). On September 3, 1996 the plaintiff filed a motion for leave to amend the complaint and to add a third count. The defendant reserves the right to address this count if the Court allows plaintiff's motion despite the late filing. (In this last cause of action, the plaintiff makes a claim under §905 of the Longshore and Harbor Workers' Compensation Act Amendments of 1972.)

II. ARGUMENT

A. Summary Judgment is Appropriate when there is No Genuine Issue of Material Fact

Fed. R. Civ. P. 56(c) provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The non-moving party must come forward with proof that a *genuine* issue of *material* fact precludes judgment if a motion for

summary judgment is properly supported. *Thomas v. Digital Equipment Corporation,* 880 F. 2d 1486, 1489 (1st Cir. 1989) (emphasis in original), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d. 202 (1986). *See also Mack v. Great Atlantic and Pacific Tea Company,* 871 F. 2d 179, 181 (1st Cir. 1989), *United States v. One Parcel of Real Property,* 900 F. 2d 470, 474 (1st Cir. 1990). A defendant moving for summary judgment is entitled to have its motion allowed if it produces evidence demonstrating the absence of a genuine issue of material fact with respect to an essential element of the plaintiff's claim and the plaintiff cannot come forward with "genuine" evidence to rebut the motion. *Celotex Corporation v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552-2553, 91 L. Ed. 265 (1986).

The U.S. Supreme Court has held that determination of seaman status under the Jones Act is a mixed question of fact and law. *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 358 111 S. Ct. 807, 112 L. Ed. 2nd 866 (1991). However, the Court went on to say that summary judgment is "mandated where the facts and the law will reasonably support only one conclusion". *Id* at 356. Such is the case here. That summary judgment is appropriate in some circumstances was reasserted by the Supreme Court in *Chandris v. Latsis*, 115 S. Ct. 2172, 2191 (1995). The court wrote that where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment. *Id.*

Dutra maintains that when the law of the First Circuit is applied to the facts in this case, the only conclusion is that Stewart was not a Jones Act seaman working

on a vessel. Likewise, he is not entitled to recover pursuant to the General Maritime Law for unseaworthiness.

B. The Plaintiff is Not Entitled to Recover as a Jones Act Seaman Employed on a Vessel and His Claim Should be Dismissed as a Matter of Law.

The Jones Act, 46 U.S.C. 688, states that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law.

1. The Plaintiff Was Not a Seaman Under the Jones Act. – *DiGiovanni v. Taylor Brothers*

The plaintiff has the burden of establishing that he qualifies as a "seaman" under the Jones Act. *Bernard v. Binnings Construction Co. Inc.* 741 F. 2d 824, 827 (5th cir. 1984). The plaintiff is a "seaman" for the purposes of the Jones Act if he proves by a preponderance of evidence that "(1) he was assigned permanently to a "vessel" or performed a substantial part of his work on a vessel, *and* (2) he performed duties which contributed to the function or operation of the vessel during a trip or at anchorage in preparation for a trip or which contributed to the mission of a trip. *Dean v. McKie Co.* 771 F Supp 466, 470 (D. Mass. 1991); *Morris v. Massachusetts Maritime Academy,* 409 Mass 179, 192, 565 N.E. 2d 422, 430 (1991). *See also Bennett v. Perini Corporation,* 510 F. 2d 114, 115 (1st cir. 1975). In every instance the Court must first decide whether the structure in question was a vessel.

The United States Court of Appeals, First Circuit decided the issue of what constitutes a vessel under the

Jones Act in the case of *DiGiovanni v. Taylor Brothers Inc.* 959 F. 2d 1119 (1st Cir. 1992). Finding that past decisions in both the first and fifth circuits "produced a difficult dividing line" *Id.* at 1122, the Court decided to look first at the *use* of the structure rather than simply to the physical characteristic in deciding whether a structure is a vessel under the Jones Act. *Id.* at 1123. In summation the Court wrote:

> if a barge, or other float's purpose or primary business is not navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seaman only when it is in actual navigation or transit. *Id.* at 1123.

In applying this simplified and effective rule to the facts presented it, the *DiGiovanni* court denied the plaintiff Jones Act recovery. Those facts were set forth by the court as follows:

> Briefly, the facts are these. The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Jamestown, Rhode Island, bridge, bearing a crane that was being used for bridge construction. Its permanent station was Davisville, Rhode Island, from which it was towed, by a tug, from time to time, to perform various shore jobs. It had been at the Jamestown bridge for a month. It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.

> Plaintiff's principal duty was to handle a tag line to guide the crane, but he also did maintenance work, such as painting, and tended lines. Although he was attached to the BETTY F, at the time of his injury he was standing on the deck of a supply barge in order better to manipulate the line. Its deck proved to be slippery, and he fell. The supply barge was in general use to carry supplies, but also served as a work platform. *Id.* at 1120, 1121.

The use of the barge in the *DiGiovanni* case is very similar to the way the Superscoop barge was used by Dutra. The Superscoop has many of the same characteristics as the BETTY F. It contains some nautical equipment and was inspected by the Coast Guard. Like the BETTY F the Superscoop had no means of self-propulsion, except that positional movement could be achieved by use of winches and anchors. (S. Tr. at 35, Ex "A") Its use in Boston Harbor was to float bearing a crane that was used for dredging to lay a tunnel (as opposed to bridge construction). Like the BETTY F, the Superscoop was towed to the site by tug. (S. Tr. at 31, Ex "A") The Superscoop was more stationary than the Betty F, which had to be moved away from the bridge every night.

The *DiGiovanni* court went on to say that looking to the use of the structure, rather than simply to the physical characteristics of the structure, does appear a reasonable resolution of Jones Act principles as against mere definitions of vessels. *Id.* at 1123. If a structure is operational in navigation than a worker is entitled to seaman status no matter the characteristics of the structure. Just as clearly, if the worker on a barge is not in navigation he is not covered under the Jones Act. A worker is not exposed to seaman's hazards "by what the vessel did in the past, or by

its future potential". *Id.* at 1123. Therefore, Stewart can find no support for his claim of being a Jones Act seamen by the fact that the Superscoop may have been used in some sort of navigation before his accident or may be so used in the future. There is no dispute that at the time he was injured the Superscoop was stationary and that during the Boston Harbor project it was used as a platform for a dredging crane.

The Superscoop fails to meet the "vessel" test and definition set forth in *Bernard v. Binnings Construction Co.* 741 F.2d 824 (5th cir. at 1984) and adopted by the First Circuit in *DiGiovanni*:

> Floating is not enough *Id.* at 828. Nor is capability of movement across navigable water *Id.* at 829. Rather, the test is whether it was designed or used primarily for the transportation of cargo, equipment or persons across navigable waters or was, at the time of Bernard's injuries, engaged in navigation. *DiGiovanni* at 1123.

The *DiGiovanni* court, satisfied it now had a workable rule, applied the rule for the sake of comparison to the facts in the Supreme Court case of *Southwest Marine Inc. v. Gizoni* 112 S.Ct. 486, 494 cited at *DiGiovanni,* 1123. In *Gizoni* the worker was a ship repairer who at the time of his accident was on a work platform engaged in transporting a rudder to a ship. He was injured when his foot went through the deck. In discussing the *Gizoni* case the *DiGiovanni* court wrote: "The platform, in other words, at the time of plaintiff's injury, was engaged in transportation, and the plaintiff was a participant in that operation. Under our rule we would be more favorable to the worker than was the *Gizoni* court." *Id.* at 1124. While the *Gizoni* court remanded the case, the *DiGiovanni* court if presented

with the same facts would have ruled as a matter of law that the plaintiff was a seamen. *Id.* at 1124.

The court was very clear in pointing out that Mr. DiGiovanni does not measure up to the plaintiff in *Gizoni*. The movement of the barge "about the piers for working convenience and at night for safety . . . This was hardly navigation or commerce, and did not diminish the primary nature of the platform's shore use and purpose." *Id.* at 1124. The *DiGiovanni* court held as a matter of law that Mr. DiGiovanni was not entitled to Jones Act recovery. Presented with the facts in Stewart, there is no doubt that following the rule as set forth in *DiGiovanni,* as a matter of law the plaintiff's claim for Jones Act recovery must be denied. Stewart is no more of a seaman than was DiGiovanni.

2. <u>The First Circuit's Decision in *DiGiovanni* is Now Widely Followed</u>

The United States District Court, E.D. New York in the matter of *Tonnesen v. Yonkers Contracting Co* 847 F. Supp. 12 (E.D. N.Y. 1994) wrote:

> other courts, including the court of appeals for the ninth circuit, have followed the first circuit's holding in *DiGiovanni. See Kathriner v. UNISEA, Inc.* 975 F. 2d. 657, 661 (9th cir 1992); *Hatch v. Durocher Dock & Dredge, Inc.* 820 F. Supp 314, 316 (E.D. Mich. 1993). The Court could not locate any courts which had rejected *DiGiovanni,* or applied an alternative standard. *Id.* at 15.

The Court added:

> The Court concludes that this standard is well reasoned, clear, and easy to apply. Most importantly the Court concludes that the first circuits analysis correctly applies the law as enumerated by the Supreme Court in *Wilander* and *Gizoni*. *Id.* at 16.

Many of the recent cases share facts similar to those in Duncan. In *Tonnesen* the plaintiff was injured when he was struck by a wooden building form that swung free while suspended from the crane on the barge on which plaintiff worked. *Id.* at 14. Like the Superscoop, the barge in *Tonnesen* was a "crane barge" which only moved in navigation while being towed to and from a work site, and when changing position at the site. *Id.* Applying the *DiGiovanni* standard, the Court first determined the primary purpose of the "vessel". *Id.* at 15. The Court further cited *DiGiovanni:*

> If the primary purpose in navigation (i.e. the transportation of people or goods on the water) then the vessel is presumed to be in navigation. See *Id.* at 1122. If the primary purpose is other than navigation then the question of whether the worker is there to perform a maritime function or a shore enterprise must be answered. See *Id.* If the worker's function is not maritime (i.e. furthering the navigation of the structure at sea) then the worker is only considered a seaman when the structure is [in navigation] (i.e. moving) see *Id.* at 15.

Stewart fares no better than did Mr. Tonnesen in claiming Jones Act seaman status. The primary purpose of the Superscoop is dredging, work which is performed with the crane. The plaintiff can not seriously argue otherwise.

There is no evidence that the Superscoop was involved in the transportation of goods or people (i.e. navigation). If the Superscoop's purpose is not navigation then the plaintiff's function is not navigation and thus not maritime. Also, the building of a tunnel to be used by automobiles is no more a maritime function than the building of a bridge for the same purpose. Therefore, Stewart is left to prove the Superscoop was in navigation at the time of the accident. It was not. The Superscoop was stationary. It is not enough that the barge could move up and down with the tide. *Id.*

The same conclusion has been reached in other cases with facts nearly identical to those facing the Court in *Stewart*. In *Nielsen v. Weeks Marine Inc.* 910 F. Supp. 84 (E.D.N.Y 1995) the plaintiff worked on a derrick barge renovating certain ships and piers on Staten Island. *Id.* at 86. Like the Superscoop the barge in Nielsen could not travel independently through open waters but could move by its own cables by using anchors and motorized winches. *Id.* The Court held that:

> The fact that plaintiff on occasion participated in handling the lines as the barge was moved along the pier did not transmogrify it into a vessel in navigation. Since plaintiff had no relationship to a vessel in navigation he has no claim under the Jones Act. *Id.* at 88.

Likewise, the fact that Stewart may have tended lines or worked on the anchor winches on occasion as one of his duties of a deck hand does not transform the Superscoop into a vessel in navigation.

In *Hatch v. Durocher Dock & Dredge, Inc.* 33 F.3d 545 (6th cir. 1994), the Sixth Circuit Court of Appeals found

DiGiovanni to be well reasoned and highly persuasive. In *Hatch* the "deckhand/pile driver was assigned to a derrick barge with no internal propulsion system and used as a piledriver in a dock building project. Plaintiff sometimes helped to move the barge. He injured his back stepping from a platform onto the barge. Since the barge's primary purpose was construction rather than transportation and was not "actually underway" when plaintiff was injured, the Court granted Defendant's Motion for Summary Judgment. See *Id.* at 548. The Court added:

> It is clear, however, that a plaintiff alleging seaman status must at a minimum show that the purported vessel was "in navigation" at the time of the injury. *Id.*

Stewart can not meet this minimum prerequisite.

While many of the cases cited involve the construction of bridges, use of the Superscoop to dredge for a tunnel makes it no more of a vessel than the other crane barges. All are being used as work platforms.

3. <u>Cases Cited by the Plaintiff are Distinguishable or Not Relevant.</u>

Counsel for the plaintiff recently filed an opposition to a motion for summary judgment filed by Dutra in an action with nearly identical issues. The defendant anticipates that Stewart will rely upon many of the same arguments and addresses them here.

The plaintiff is expected to cite the case of *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991) for the proposition that there is no requirement that an employee aid in the navigation of a vessel in an order to qualify as a

Jones Act Seaman. This issue is not in dispute. The defendant acknowledges that Stewart's duties contributed to the function of the Superscoop. The relevant issue is whether the Superscoop is a vessel pursuant to the Jones Act. That issue was never before the *McDermott* court, a case that was dealing not with a work platform but the American-Flag Vessel M/V Gates Tide, a paint boat. The court in *McDermott* wrote "The question presented here is narrow. . . . we are asked only if Wilander should be precluded from seaman status because he did not perform transportation-related functions on board." *Id* at 356, 357.

The plaintiff will also cite the 1995 Supreme Court case of *Chandris v. Latsis,* 115 S. Ct. 2172 (1995). While the Court in *McDermott* addressed the type of activities a worker must perform to fall within the protection of the Jones Act, the *Chandris* court determined "what relationship a worker must have to the vessel" in order to obtain seaman status. *Id* at 2181. As in *McDermott,* whether or not the "structures" were vessels under the Jones Act was not in question and thus not an issue. The subject vessels in *Chandris* consisted of six passenger cruise ships. Whether the structure was a "vessel in navigation" was also not in question in *Chandris.* At the time of his injury, the plaintiff was on board one of the cruise ships sailing to Bermuda. *Id.* Therefore, answering the two part *Chandris* test in the affirmative is irrelevant to the issue whether the Superscoop was a vessel in navigation. It should be pointed out that the Court in *Chandris* was not unaware of the First Circuit's decision in *DiGiovanni* and cited *DiGiovanni. Id.* at 2192. At no point did the *Chandris* court address the rule for seaman established by the *DiGiovanni* court.

The plaintiff may also cite cases from the Fifth Circuit *(Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959) and *Ducote v. Keeler & Co., Inc.,* 953 F.2d 1000 (5th Cir. 1992)) which the *DiGiovanni* court has specifically decided not to follow or would surely have rejected.

The holding by the first circuit in *DiGiovanni* that the barge's prior use or future use is irrelevant, is a clear rejection of the fifth circuits thinking in *Ducote.* The *Ducote* court reversed the district court's summary judgment for the defendant and remanded the case. *Id.* at 1004. In *Ducote* the plaintiff was operating a dragline/crane from the deck of a spud barge. He was in the process of driving piles at the time he was injured.

In reversing the lower court the court in *Ducote* focused on two factors. First, the court looked at "the purpose for which this barge was constructed". *Id.* at 1003. Secondly, the court looked at the future use of the barge during the project. The court wrote "the scope of the project, however, called for the spud barge to be moved approximately five miles along the bank of the Red River. This planned movement distinguishes this spud barge from the structures in the *Cook* line of cases". *Id.* at 1004. This way of thinking was rejected by the first circuit in *DiGiovanni.* The *DiGiovanni* court made clear that it was more interested in the use of the barge at the time of the plaintiff's injury and not the shape of the barge or its potential use in the future.

III. CONCLUSION

The evolution of the definition of "seamen" and "vessel" in the First Circuit for purposes of recovery under the Jones Act bars the plaintiff from recovery in this case. The

same standards apply to Count II of the plaintiff's complaint (Maintenance and Cure). There exists no genuine issue of material fact in this case, and summary judgment should enter for Dutra Construction Co. on all counts.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
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PEABODY & ARNOLD
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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this day September, 1996 served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

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One Union Street
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/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

EXHIBIT "A"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CA # 95-11046 (RCL)
WILLARD T. STEWART
Plaintiff
VS.
DUTRA CONSTRUCTION CO., INC.
Defendant

DEPOSITION OF WILLARD T. STEWART, taken pursuant to Notice under the applicable provisions of the Massachusetts Rules of Civil Procedure on behalf of the Defendant, before Joan M. Barry, a Notary Public in and for the Commonwealth of Massachusetts, at the offices of Peabody & Arnold, 50 Rowes Wharf, Boston, Massachusetts, on Tuesday, May 21, 1996, commencing at 11:30 a.m.

NEAL A. SALLOWAY – COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
(617) 581-3993 – (508) 535-0313

APPEARANCES:

PEABODY & ARNOLD
(by Frederick E. Connelly, Jr., Esq.)
50 Rowes Wharf
Boston, Massachusetts 02110
On behalf of the Defendant
MARVIN E. BARISH, ESQ.

(by Gregory L. Nester, Esq.)
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Suite 801
Philadelphia, Pennsylvania 19106
On behalf of the Plaintiff

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DEPONENT	DIRECT	CROSS
Willard T. Stewart		
By Mr. Connelly	4	

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[4] MR. NESTER: I would like him to read and sign. Okay. I'll explain that to him afterwards. We'll waive notary. He doesn't have to do it in front of a notary.

MR. CONNELLY: All objections reserved until the time of trial, except as to form. All motions to strike are reserved. As far as reading and signing, twenty-one days will be enough time once he receives it?

MR. NESTER: Once I receive it, it should be. If that's problematic, I'll let you know.

WILLARD T. STEWART

having been first duly sworn, deposes and testifies as follows:

EXAMINATION

BY MR. CONNELLY:

Q. Mr. Stewart, my name is Frederick Connelly, and I represent the defendant, Dutra Construction Company. I am going to be asking you some questions today.

I first want to go over a few groundrules so the proceedings will go a little smoother. You may have discussed some of this with your attorney already. You're going to have to answer each question outloud, okay, and

* * *

[28] A. Uh-huh

Q. So, for those ten years, you were assisting them in building an island, right?

A. They were still working on it.

Q. What is that island for?

A. Containment area for dredge from the Baltimore Harbor, from Baltimore Harbor and the ship channel.

Q. Where is Great Lakes located?

A. Their main office is in Chicago. They have an office in Baltimore, one in, I think, New York, and I think in Florida somewhere.

Q. Had you ever worked for Dutra before the Boston job?

A. No.

Q. So, Great Lakes job ended, and you had about four mounts off?

A. Approximately, yes.

Q. And when you were not working, would you collect unemployment?

A. Uh-huh.

Q. Yes?

A. Yes.

MR. NESTER: One second.

* * *

[31] Q. Had you ever worked on a dredge like that before?

A. That particular – every one is a little different. I have worked on that similar, but not exactly the same.

Q. All right. Describe for me this dredge. What is it called, the Super Scoop?

A. Yes.

Q. What is a Super Scoop?

A. It's a dredge, yes.

Q. Describe it for me?

A. It does, it's digging with a clamshell bucket. It's like a crane, a crane laddered on a barge.

Q. Okay. When you arrived in Boston, was the Super Scoop already here?

A. Yes.

Q. Do you know how it got here?

A. It had been here, I guess, approximately a week.

Q. Do you know how it got here?

A. I believe it was towed by a tug, I believe.

Q. From California?

A. Yes.

* * *

[33] there.

Q. Okay, and there was only one dredge on the Super Scoop?

A. Yes.

Q. And that always remained on it as far as you know?

A. Yes.

Q. How much of your time was spent on the Super Scoop during the time you were on the job?

A. I would say 99 and 9/10s.

Q. 99 and 9/10s?

A. Right.

Q. So, just about all your time was on the Super Scoop?

A. Yes.

Q. What engines on the Super Scoop did you have responsibility for?

A. The main engine on the hoist. They had two deck engines. Occasionally, if they had a problem with the boat, I would deal with that. They would ask me to come check it out, but –

Q. What boat is that?

A. The work boat they had.

[34] (Discussion held off the record.)

Q. We were discussing the engines that you are responsible for, three main ones were the main engine to hoist and the two deck engines?

A. Yes.

Q. And you had spent all your time on the Super Scoop working on those?

A. Yes.

Q. Were you the only person or engineer on the Super Scoop?

A. No. There's three engineers. Not at the same time. I mean, shift work.

Q. Okay. During your shifts, were you the only engineer on the Super Scoop?

A. Yes.

Q. Now, I take it none of these engines had anything to do with the movement of the Super Scoop and the water?

A. The deck engines do. They operate, hoist, cables and ankers and so on.

Q. What would these be used for?

A. Moving Super Scoop to do the dredging operation.

* * *

[53] Q. And you were going to say, hey, I'll help you, tell me what to do?

A. Yes, basically, yes.

Q. Did you start working with him before you were injured?

A. I wasn't working with him. He said, he had – He was finishing up with the engine, he was finishing up. I said, well, since you're all right, I'll feed the wires down through and go ahead and wire up the remote control and take care of that. That's something he would have done if I weren't there to help him.

Q. What job was this to hook it up? I don't understand. What are you hooking up?

A. They had a remote control unit. They operated a scow from the tug boat by remote control.

Q. And that was unhooked when he replaced the engine?

A. Yes. They took the top building off of the scow. They took the top building off where the wires are up through and up through and then there was the control panel down blow.

They disconnected it. So, they could take this building off and disconnected the wiring from the

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLARD STEWART, Plaintiff, v. DUTRA CONSTRUCTION CO., INC., Defendant.	CIVIL ACTION NO. 95-11046-RCL

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, Dutra Construction Co, Inc. ("Dutra"), and respectfully requests the Court to grant it summary judgment on all counts. Dutra submitted a Motion for Summary Judgment with respect to all counts of the plaintiff's original Complaint. Since that time, the court has allowed the plaintiff to amend his Complaint to add a count under Se tion 905(b) of the Longshore and Harbor Workers' Compensation Act. Having reserved its rights to supplement its initial Motion for Summary Judgment, the defendant hereby submits its Supplemental Motion for Summary Judgment and argues that there is no genuine issues of material fact and that the plaintiff is not entitled to Section 905(b) benefits as a matter of law.

In support of its Supplemental Motion, Dutra refers to and incorporates herein the attached Memorandum of Law, relevant portions of the transcript of the plaintiffs deposition and the Amended Complaint.

REQUEST FOR ORAL ARGUMENT

The defendant believes that oral argument will assist the court in deciding this matter and therefore requests to be heard.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 17 day of October, 1996, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

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Frederick E. Connelly, Jr.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLARD STEWART, Plaintiff, v. DUTRA CONSTRUCTION CO., INC., Defendant.	CIVIL ACTION NO. 95-11046-RCL

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S MEMORANDUM IN SUPPORT OF ITS SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

The defendant, Dutra Construction Co. ("Dutra"), incorporates herein by reference its Memorandum in Support of its Motion for Summary Judgment and submits the following memorandum in support of its Supplemental Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c). Dutra asserts that no genuine issues of material fact exist in this case and that Dutra is entitled to summary judgment as a matter of law on all counts of the plaintiff's Amended Complaint.

I. CONCISE STATEMENT OF MATERIAL FACTS OF RECORD AS TO WHICH IT IS CONTENDED THAT THERE EXISTS NO GENUINE ISSUES TO BE TRIED

The plaintiff was hired by Dutra out of the union hall in late 1992 (Stewart Deposition Transcript at 26, Exhibit

"A").[1] He was responsible for maintaining the engines on the Superscoop (S. Tr. at 33), and generally, it was part of his job to "do what it took to get [the dredge] running again" when it shut down (S. Tr. at 50). He also checked the oil on the scows once per week or checked the engine (S. Tr. at 46). His employment duties included working on the scows, as the operation of the scows was necessary for dredging (S. Tr. at 49-50).

II. ARGUMENT

C. The Plaintiff is Not Entitled to Recover Under the Longshore and Harbor Workers' Compensation Act ("LHWCA")

The LHWCA, 33 U.S.C. 905(b), provides in pertinent part that

> in the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel.

Although Jones Act and LHWCA actions are mutually exclusive, and the plaintiff would be entitled to proceed under the LHWCA in the absence of a Jones Act case, the facts of this particular case bar LHWCA recovery.

In his amended complaint, the plaintiff has added a count under Section 905(b) authorizing covered employees to sue a vessel as a third party for injury caused by the negligence of the vessel (*Stewart* Amended Complaint,

[1] The deposition transcript of Willard Stewart shall hereinafter be referred to as "S. Tr."

Exhibit "B"). While Dutra may be subject to suit under Section 905(b) in its capacity as "vessel owner," Dutra is immune from tort actions under the LHWCA in its capacity as the plaintiff's employer. *See DiGiovanni v. Traylor Bros., Inc.*" 855 F. Supp. 37 (D.R.I. 1994) (citing *Levens v. Pintail Enters. Inc.*, 943 F.2d 528, 531 (5th Cir. 1991), *cert. denied,* 504 U.S. 940 (1992)). To prevail, the plaintiff must show that any negligence on Dutra's part is attributable to it as vessel owner rather than as Stewart's LHWCA employer. *See id.* Thus, the court must decide whether Dutra's alleged negligence occurred in its vessel capacity (allowing suit to be brought under Section 905(b)) or in its employer capacity (immunizing it from suit).[2]

The nearly identical issue was before the Unites States Court of Appeals for the First Circuit in the case of *Morehead v. Atkinson-Kiewit*, 75 F.3d 736 (1st Cir. 1996).[3] In *Morehead*, the plaintiff was injured when he stepped backwards into an open hatch on one of the barges (*Morehead* Opinion at 4). The evidence showed that the hatch had been left open for several days to allow access to a marine surveyor. (*Id.*) The plaintiff alleged that the vessel

[2] The plaintiff has alleged in his amended complaint negligence of Dutra and unseaworthiness of the Superscoop. Section 905(b) provides in pertinent part: "The liability of the vessel under this subsection shall not be based upon the warranty of the seaworthiness or a breach thereof at the time the injury occurred." Because of this statutory bar to the plaintiff's unseaworthiness claim, the defendant will only address the plaintiff's negligence allegations.

[3] While the *Morehead* opinion has been withdrawn from publication because a rehearing en banc is pending, the court's decision is sound. The slip opinion is attached hereto as Exhibit "C" and will hereinafter be referred to as "Morehead Opinion."

owner was negligent for allowing the hatch to remain open and for failing to warn. (*Id.* at 5).

In deciding under what capacity the barge owner/employer, Atkinson-Kiewit, was negligent, the court followed the reasoning that "a court may have to divide the single defendant into a hypothetical independent employer and independent vessel owner." (*Id.* at 24). The *Morehead* court explained that the plaintiff's burden would not and should not be easy:

> The statutory language and the legislative history of the 1972 and 1984 Amendments plainly evidence Congress' intent that the workers' compensation scheme be the primary remedy for all covered workers, regardless of an employer's commercial practice in regard to vessel ownership. . . . We are not disposed to upset the balance by expanding the liability of employers that act simultaneously as vessel owners.

(*Id.* at 24-25). The court further wrote that "[t]he exception in Section 905(b) for third-party negligence, removed in 1984, explicitly requires a finding of vessel fault." (*Morehead* Opinion at 30).

The *Morehead* court adopted the reasoning of the seminal case of *Scindia Steam Navigation Co. v. De los Santos,* 451 U.S. 156 (1981):

> [O]nce longshore workers came on board and began carrying out their cargo duties under a stevedore's supervision, the vessel itself had no general duty to exercise reasonable care to inspect for unsafe workplace conditions; rather it could rely on the longshore worker's employer to do so.

(*Id.* at 26, quoting *Scindia,* 451 U.S. at 172). Applying the reasoning of *Scindia* to the facts before it, the *Morehead* court concluded that "*Scindia's* principle of limited liability of the vessel sensibly and logically applies, because the employees effectively assumed control of the barge working under [Atkinson-Kiewit] in its capacity as their employer rather than . . . as the charterer (hence owner) of the barge." (*Id.*)

The *Morehead* court rejected the argument that a vessel assumes a greater duty of care when there is no independent employer responsible for workplace conditions. (*Morehead* Opinion at 19). The court cited *Castorina v. Lykes Bros. S.S.,* 758 F.2d 1025 (5th Cir.), *cert. denied,* 474 U.S. 846 (1985). In *Castorina,* a longshore worker exposed to asbestos during cargo operations alleged that his employer-vessel owner knew of the harm of a vessel and failed to make the vessel safe. The court refused to impute any knowledge of this damage by the employer to it as vessel, writing: "To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of Sections 905(a) and (b)." *Id* at 1033.

Therefore, the plaintiff cannot argue that Dutra had knowledge as dredging company/contractor that the hatch was open or unguarded and that the knowledge should be imputed to Dutra as vessel owner.

The plaintiff is expected to argue that the allegedly negligent acts performed by co-workers which led to his accident were performed in furtherance of the vessel or that the work he was performing when injured was in furtherance of the vessel. The *Morehead* court recognized

this competing analysis and rejected it. (*Id* at 29). In *Morehead* the plaintiff argued that the act of leaving the hatch open was to help the vessel and not in furtherance of some construction activity. In response the court wrote:

> One of the essential purposes of the 1972 and 1984 Amendments was to provide employees and employers with a greater degree of certainty as to the coverage in effect. The legislative history of the 1984 Amendment documents this concern:
>
> > [T]he situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of the injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.
>
> 1984 U.S.C.C.A.N. at 2736-2737. A "functional" interpretation, hinging the type of liability on the nature and purpose of the duties being performed by covered employees at any given time, would increase uncertainty and the frequency of disputes over the scope of coverage.

(*Morehead* Opinion at 31). In referencing the dual capacity of the employee, the *Morehead* court noted that both types of activities – construction and scowmen's work, – assigned to the harbor workers were performed for Atkinson-Kiewit as *employer* and not as vessel owner. (*Id.* at 26). The *Morehead* court emphasized that because the employment contemplated both construction and linehandling, a single, overall classification was most appropriate for determining the types of remedies available. (*Id.* at 31). Thus, rejecting the plaintiff's argument in that case, the *Morehead* court pointed out that "[a]s is typical in the case

of harbor workers . . . the men were expected to lend a hand with supporting maritime chores as well as pursuing their particular construction trade," and therefore, "the barges tended by its carpenters/scowmen were operated within [Atkinson-Kiewit's] control and knowledge qua employer." (*Id.* at 28).

The same holds true in the case at bar. Stewart and his fellow dredge workers' employment contemplated that their duties would also alternate between work for Dutra as employer and for Dutra as vessel owner. Dutra hired harbor workers through the union hall (S. Tr. at 26). The plaintiff and the other employees on the Superscoop were hired to do tasks relating to both dredging and work on the vessels (S. Tr. at 33, 34, 46, 50). The various engines that Stewart was hired to maintain were used for dredging (the engines that ran the crane), dumping (the engines on the scows) and moving the dredge (deck winches). (S. Tr. at 33-35, 46). At the time he was injured, the plaintiff was working on the remote control for the scow engine which allowed easier dumping of the dredged materials. (S. Tr. at 45). He was therefore performing his regular duties as engineer on a dredging operation. Attempts by the plaintiff in *Morehead* to bifurcate his vessel and construction activities were rejected by the court because the workers were hired to perform both. (*See Morehead* Opinion at 18).

Other employees were also performing "employment duties" when the plaintiff was allegedly injured on the scow (S. Tr. at 50, 53), The operator of the crane was maneuvering the bucket while the deckhands/scowmen were tending lines. (S. Tr. at 129-131). Brad Shoffit was the supervisor of the dredging operation and the captain of the superscoop. (S. Tr. at 129-131). All employees were involved in the dredging process. The *Morehead* court

noted that the owner did not employ a separate crew on its barges. (*Morehead* Opinion at 17). The same applies to Dutra in the case at bar.

Thus, the Superscoop and the adjoining scow were operated within Dutra's control and knowledge qua employer. Furthermore, there is no claim or evidence that the alleged negligent conditions are attributable to the errors of separate maritime agents acting specifically for the vessel. (*See Morehead* Opinion at 26-27).

III. CONCLUSION

Wherefore, the defendant, Dutra Construction Co., Inc., respectfully requests that the court grant its Motion for Summary Judgment on all counts of the plaintiff's Amended Complaint.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
BBO #544538
Moujan M. Walkow,
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PEABODY & ARNOLD
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Boston, MA 02110
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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 17 day of October, 1996, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

Gregory L. Nester, Esq.
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/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CA # 95-11046 (RCL)

WILLARD T. STEWART

Plaintiff

VS.

DUTRA CONSTRUCTION CO., INC.

Defendant

DEPOSITION OF WILLARD T. STEWART, taken pursuant to Notice under the applicable provisions of the Massachusetts Rules of Civil Procedure on behalf of the Defendant, before Joan M. Barry, a Notary Public in and for the Commonwealth of Massachusetts, at the offices of Peabody & Arnold, 50 Rowes Wharf, Boston, Massachusetts, on Tuesday, May 21, 1996, commencing at 11:30 a.m.

NEAL A. SALLOWAY – COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
(617) 581-3993 – (508) 535-0313

APPEARANCES:

PEABODY & ARNOLD

(by Frederick E. Connelly, Jr., Esq.)

50 Rowes Wharf

Boston, Massachusetts 02110

On behalf of the Defendant

MARVIN E. BARISH, ESQ.

(by Gregory L. Nester, Esq.)

The Curtis Center

Sixth and Walnut Streets

Suite 801

Philadelphia, Pennsylvania 19106

On behalf of the Plaintiff

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DEPONENT	DIRECT	CROSS
Willard T. Stewart		
By Mr. Connelly	4	

EXHIBITS

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[4] MR. NESTER: I would like him to read and sign. Okay. I'll explain that to him afterwards. We'll waive notary. He doesn't have to do it in front of a notary.

MR. CONNELLY: All objections reserved until the time of trial, except as to form. All motions to strike are reserved. As far as reading and signing, twenty-one days will be enough time once he receives it?

MR. NESTER: Once I receive it, it should be. If that's problematic, I'll let you know.

WILLARD T. STEWART

having been first duly sworn, deposes and testifies as follows:

EXAMINATION

BY MR. CONNELLY:

Q. Mr. Stewart, my name is Frederick Connelly, and I represent the defendant, Dutra Construction Company. I am going to be asking you some questions today

I first want to go over a few groundrules so the proceedings will go a little smoother. You may have discussed some of this with your attorney already. You're going to have to answer each question outloud, okay, and

* * *

[26] Q. Do your hammer toes in any way affect the work you can do?

A. No.

Q. If at any time during the deposition today you think of any other injuries or claims you've made that you didn't think of before, just let me know.

Okay?

A. Sure.

Q. When did you first start working for Dutra?

A. I believe it was December, 1992. November or December. I know it was cold weather.

Q. And you were hired out of the union hall?

A. Yes.

Q. Okay. When had you last worked before you began working at the Boston job?

A. Where did I last work before that?

MR. NESTER: For Dutra or anybody?

Q. Anybody?

A. I worked for – I was off work for like four months before I worked – I worked in Baltimore.

Q. You worked where?

A. In Baltimore, Baltimore area.

Q. And what company was that for?

* * *

[33] there.

Q. Okay, and there was only one dredge on the Super Scoop?

A. Yes.

Q. And that always remained on it as far as you know?

A. Yes.

Q. How much of your time was spent on the Super Scoop during the time you were on the job?

A. I would say 99 and 9/10s.

Q. 99 and 9/10s?

A. Right.

Q. So, just about all your time was on the Super Scoop?

A. Yes.

Q. What engines on the Super Scoop did you have responsibility for?

A. The main engine on the hoist. They had two deck engines. Occasionally, if they had a problem with the boat, I would deal with that. They would ask me to come check it out, but –

Q. What boat is that?

A. The work boat they had.

[34] (Discussion held off the record.)

Q. We were discussing the engines that you are responsible for, three main ones were the main engine to hoist and the two deck engines?

A. Yes.

Q. And you had spent all your time on the Super Scoop working on those?

A. Yes.

Q. Were you the only person or engineer on the Super Scoop?

A. No. There's three engineers. Not at the same time. I mean, shift work.

Q. Okay. During your shifts, were you the only engineer on the Super Scoop?

A. Yes.

Q. Now, I take it none of these engines had anything to do with the movement of the Super Scoop and the water?

A. The deck engines do. They operate, hoist, cables and ankers and so on.

Q. What would these be used for?

A. Moving Super Scoop to do the dredging operation.

[35] Q. Okay.

A. And –

Q. Do they have any other purposes than moving the Super Scoop?

A. No.

Q. And those would be used how – Would it be by ankers?

A. Yes, ankers and the cables.

Q. And did it have any other form of propulsion other than that?

A. No.

Q. It didn't have a propeller, no.

Q. And how many times during a day would it move? Let me rephrase that.

How many times during a shift would it move?

A. I don't know. Say working a twelve-hour shift, maybe, mostly I guess the work, I would guess six times.

Q. And how far would it be moved?

A. On each move, thirty feet, fifty feet.

Q. How long would each move take?

A. Normally, just a few minutes, maybe five minutes.

* * *

[45] So, I went over to see what I could do to help the Caterpillar man finish up and get the show on the road.

He was finishing up with the engine. So, I decided, I disconnected the wiring the day before. So, I fed the wires back down there and connected the wires back up for the remote control for the lights and so on and on that little building on that thing, and while I was doing this, I was on my knees feeding the wire down through, and they

decided to move the scow around to the other side of the dredge to start filling it up and apparently, I could pretty much nearly drop the bucket in there, swing it around and everything went flying and when it snapped, I don't know what happened, and when I slipped, that's when it all happened.

Q. We'll break it down to make it a little clearer.

Starting with the – Was the engine on the scow that needed replacing?

A. Yes.

Q. They were going to replace the entire engine?

A. The scow 4.

Q. How many scows were being used out there?

[46] A. I think two.

Q. What were the other scow's number?

A. 151 – something like that. 151. I can't remember exactly.

Q. Had you been on the scows at all either shortly before the accident? Had you been on either scow before the day of your –

A. Yes. I check the oil once a week or check the engine.

Q. Now, the scows, do they have self propulsion?

A. No.

Q. They have to be torqued, don't they?

A. Yes.

Q. The engine you're talking about is the hopper?

A. Yes.

Q. Which opens up into the ocean and dumps the dredging material?

A. Yes.

Q. Onto the fish and clams below?

A. Yes.

Q. So, the engine in the scow number 4 blew out or something?

* * *

[50] Q. All right.

A. I wasn't ordered to. It was part of my job when the dredge is shut down to do what it took to get it running again.

Q. Okay. The dredge was shut down. So, you couldn't work.

There was no reason for you to work on the engine of the dredge?

A. Not at that time, no.

Q. So, basically, until this scow gets fixed, you had nothing to do?

MR. NESTER: I'll object to the form of the question.

Q. Let me ask you, did you have any work to do on the Super Scoop until scow number 4 was fixed?

A. I could have. I probably – but not that it was important as getting the scow, to get the dredge back in operation.

Q. Now, was a Caterpillar mechanic there?

A. Yes.

Q. His job was to replace the scow engine?

A. Yes.

Q. Did he have anyone helping him?

[51] A. No, not at that time, no.

Q. What was the first day he was out there?

A. First day.

Q. Was that the first day?

A. I believe the day before, I believe he got there the day before.

Q. Did you check with anyone, any supervisor before you went on to the scow?

A. I talked to the captain, yes.

Q. Who was that?

A. Brad Shoffit.

Q. What did you say to him and what did he say to you?

A. I don't remember.

Q. In any event, you went from the Super Scoop onto the scow?

A. Yes.

Q. And was the scow along side of the Super Scoop at this point?

A. Yes.

Q. Directly along side?

A. Yes.

Q. And how would you get from the Super Scoop to [52] the scow?

A. It was like a, the ladder built right into the side of the – You step off the deck, go off the ladder and onto the scow.

Q. The scow was higher than the Super Scoop?

A. Yes.

Q. Would the scow be tied to Super Scoop?

A. Ropes.

Q. Okay. Several different ropes?

A. Ropes or cables from the winches.

Q. And were there any buffers between the two?

A. Normally, yes. There are tires in there.

Q. Just black tires?

A. Yes.

Q. Hung along side?

A. Yes.

Q. So, you climb aboard the scow?

A. Yes.

Q. Did you have any tools with you?

A. I don't think so.

Q. Okay. And then you, I take it, went to find the Caterpillar mechanic?

A. Yes.

[53] Q. And you were going to say, hey, I'll help you, tell me what to do?

A. Yes, basically, yes.

Q. Did you start working with him before you were injured?

A. I wasn't working with him. He said, he had – He was finishing up with the engine, he was finishing up. I said, well, since you're all right, I'll feed the wires down through and go ahead and wire up the remote control and take care of that. That's something he would have done if I weren't there to help him.

Q. What job was this to hook it up? I don't understand. What are you hooking up?

A. They had a remote control unit. They operated a scow from the tug boat by remote control.

Q. And that was unhooked when he replaced the engine?

A. Yes. They took the top building off of the scow. They took the top building off where the wires are up

through and up through and then there was the control panel down blow.

They disconnected it. So, they could take this building off and disconnected the wiring from the

* * *

[129] A. No.

Q. What people, what crew members were onboard the Super Scoop at the time you were injured. You mentioned Malcolm Oldham?

A. Malcolm Oldham, Bill Duncan, I think, was onboard.

Q. What was he?

A. Pardon me.

Q. What was his job?

A. He was a mate.

Q. Did he ever operate the Super Scoop?

A. I don't think so. I don't know.

Q. Who else was onboard? Was Brad Shoffit onboard?

A. Yes.

Q. He was?

A. Yes. I'm trying to think. Stanley Oldham, I think he was on. I think Roger Hammond. He was a civil engineer. I believe he was on.

Q. Roger Hammond?

A. Yes.

Q. Who would you take orders from?

A. Roger.

[130] Q. Roger would give you orders?

A. No. Who did I take orders from?

Q. Yes.

A. The only one that gave me orders, if anybody, would be Brad Shoffit. He was the captain.

Q. Okay. Any other names of people out –

A. Pardon me.

Q. Can you recall names of any other people working out there?

A. I think Stanley Oldham, I think, was working. I am bad at remembering names. You'll have to ask me.

Q. Okay. In the six or seven months you had been working on the Super Scoop before the day of your accident, how many times had you seen a scow being brought along side the Super Scoop, a couple of times a week or –

A. Oh, yes, early in the job, it was a couple of times a day.

Q. Were they all brought in the same way by putting the bucket in the scow?

A. No. They brought them in with a tug boat sometimes and push. Once, occasionally, they put the bucket in to, you know, bring it in a little closer to hold it until they

got it tied up mostly was what they [131] used the bucket for.

Q. Okay. When you went from the Super Scoop onto the scow, it was tied up.

Is that right?

A. Yes.

Q. So, it had to be untied by the deck hands?

A. Yes.

Q. And then the bucket would have pushed it away and brought it around?

A. Yes.

Q. And you didn't realize any of that was going on?

A. No.

Q. And just, I believe I asked you this, just so I'm clear, the engine that was being worked on on the scow was the engine used to open the hoppers?

A. Yes.

Q. It wasn't to propel the scow?

A. No.

Q. You never slept on the Super Scoop. Is that right?

A. Pardon me.

Q. There was no place for you to sleep on the

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLARD T. STEWART, Plaintiff	)
V.	) CIVIL ACTION) NO. 95-11046 (RCL)
DUTRA CONSTRUCTION CO., INC., Defendant.	)

ANSWER OF DUTRA CONSTRUCTION CO., INC. TO PLAINTIFF'S AMENDED COMPLAINT

(Filed Dec. 3, 1996)

Now comes the Defendant, Dutra Construction Co., Inc., by and through its attorneys, Peabody & Arnold, and herewith gives its answer to the plaintiff's complaint, reserving all rights to seek additional defenses to the complaint by appropriate motion.

All allegations not specifically admitted herein are denied. The defendant, Dutra Construction Co., Inc., (hereinafter "Dutra") answers each numbered paragraph as follows:

First Cause of Action

1. The defendant denies the allegations contained in paragraph one.

2. The defendant denies that the plaintiff has standing or is entitled to bring an action under the Jones Act, 46 U.S.C. §688 *et seq* or under the General Maritime Laws of the United States District Court.

3. The defendant denies the allegations contained in paragraph three.

4. The defendant admits that it employed the plaintiff but denies that he was the member of a crew. The defendant denies the remaining allegations of paragraph four.

5. The defendant denies the allegations contained in paragraph five.

6. The defendant denies the allegations contained in paragraph six.

7. The defendant denies the allegations contained in paragraph seven.

Wherefore, the defendant demands that the plaintiff's complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

Second Cause of Action

The defendant denies that the plaintiff is entitled to maintenance and cure and wages and further answers as follows:

8. The defendant incorporates herein by reference its answers to paragraphs 1-7 and makes that its answer to paragraph eight.

9. The defendant denies the allegations contained in paragraph nine.

10. The defendant is unable to admit or deny the allegations of jurisdiction and calls upon the plaintiff to prove same. The defendant denies that the plaintiff has standing or is entitled to bring an action under the Jones Act (46 (USC §688 et seq) or under the General Maritime Laws of the United States District Court.

Wherefore, the defendant demands that the plaintiffs complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

Third Cause of Action

11. The defendant incorporates herein by reference its answers to paragraphs 1-10 and makes that its answer to paragraph 11.

12. The defendant denies the allegations contained in paragraph twelve.

13. The defendant denies the allegations contained in paragraph thirteen.

(a) The defendant denies the allegations contained in paragraph thirteen (a).

(b) The defendant denies the allegations contained in paragraph thirteen (b).

(c) The defendant denies the allegations contained in paragraph thirteen (c).

(d) The defendant denies the allegations contained in paragraph thirteen (d).

(e) The defendant denies the allegations contained in paragraph thirteen (e).

(f) The defendant denies the allegations contained in paragraph thirteen (f).

(g) The defendant denies the allegations contained in paragraph thirteen (g).

(h) The defendant denies the allegations contained in paragraph thirteen (h).

(i) The defendant denies the allegations contained in paragraph thirteen (i).

(j) The defendant denies the allegations contained in paragraph thirteen (j).

(k) The defendant denies the allegations contained in paragraph thirteen (k).

(l) The defendant denies the allegations contained in paragraph thirteen (l).

(m) The defendant denies the allegations contained in paragraph thirteen (m).

(n) The defendant denies the allegations contained in paragraph thirteen (n).

14. The defendant denies the allegations contained in paragraph fourteen.

15. The defendant denies the allegations contained in paragraph fifteen.

THE DEFENDANT, DUTRA CONSTRUCTION CO., INC. ASSERTS THE FOLLOWING AFFIRMATIVE DEFENSES

Now comes the defendant and incorporates the following affirmative defense into each and every count contained in its Answer to Plaintiff's complaint as follows:

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, those injuries were the sole and proximate cause of actions of third parties for who the defendant is not legally responsible.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, those injuries were the result of an Act of God for which the defendant is not legally responsible.

FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, it was due in whole or in part to the plaintiff's own negligence and failure to exercise his duty of care, skill, and knowledge in the performance of his work reasonably to be required of a person of the plaintiff's experience and not due to any negligence or fault on the part of the defendant or any persons for whom the defendant may be legally responsible.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, such injury was without fault, knowledge or privity of the defendant, that the damages claimed herein exceed the value of the vessel, including her pending freight; and the defendant herewith claims benefits of any and all laws and statutes of Liability of the defendant, including 46 U.S.C. Section 183(b).

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the injury alleged was sustained, they did not occur while the plaintiff was in the service of the vessel.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that the plaintiff breached his contractual duties to the

vessel owner and, therefore, cannot recover under the Walker Doctrine.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that the Dredge Superscoup and Scow No. 4 is not a vessel as that term is used in the Jones Act, 46 U.S.C. Section 688 et seq, General Maritime Law, or any other applicable statute, both state and federal, and, therefore, plaintiff is not entitled to recover.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that the plaintiff is not entitled to a trial by jury.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant states that it did not own the "vessel" as alleged. As a result the plaintiff lacks jurisdiction under either the Merchant Marine Act or the general maritime law to pursue this case of action.

AND FURTHER ANSWERING, AND AS A. COMPLETE AND SEPARATE DEFENSE, the defendant says that the plaintiff is barred from bringing a civil claim because he received payments as a result of a workers compensation claim or similar claim.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if it was negligent it was negligent in its capacity as employer and not as vessel owner, thus barring the plaintiff's claim brought pursuant to Section 905(b) of the Longshore & Harbor Workers Compensation Act.

WHEREFORE, the defendant demands that the plaintiffs complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

JURY CLAIM

The defendant demands a trial by jury for all applicable Counts.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
BBO #544538
PEABODY & ARNOLD
50 Rowes Wharf
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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 2 day of December, 1996, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

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Philadelphia, PA 19106

Thomas J. Hunt, Esq.
One Union Street
Boston, MA 02108

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM P. KROMHOUT, Plaintiff	)	
v.	)	C.A. NO. 95-12311-NG
DUTRA CONSTRUCTION COMPANY, INC., Defendant	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS

(Filed Oct. 6, 1999)

REQUEST NO. 1

On December 14, 1992, the defendant, Dutra, owned, operated, and controlled the BARGE SUPER SCOOP.

RESPONSE NO. 1

Objection on the grounds that the term "controlled" calls for a legal determination which the defendant is not qualified to make. Without waiving this objection and subject to it, the defendant states that on December 14, 1992 it owned and operated the Superscoop.

REQUEST NO. 2

On December, 14, 1992, the SUPER SCOOP was located in Boston Harbor on navigable waters of the United States and was engaged in the dredging operations referred to as "Third Harbor Tunnel."

RESPONSE NO. 2

The defendant admits that on December 14, 1992 the Superscoop was located in Boston Harbor and was engaged in the dredging operation referred to as "Third Harbor Tunnel."

REQUEST NO. 3

The defendant admits that construction of the Superscoop was completed in approximately June, 1976.

RESPONSE NO. 3

The defendant admits the allegations contained in Request No. 3.

REQUEST NO. 4

The SUPER SCOOP was formerly operating on the west coast of the United States and sailed through the Panama Canal under tow to the Boston area to participate in the dredging operation for the Third Harbor Tunnel.

RESPONSE NO. 4

The defendant admits the allegations contained in Request No. 4.

REQUEST NO.5

Movement of the SUPER SCOOP was a necessary part of the dredging operation and was done by the use of the 4 anchors and this was a daily operation.

RESPONSE NO. 5

The defendant admits that on most days during the time that the Superscoop was performing dredging it would be moved a short distance by use of its anchors.

REQUEST NO. 6

The SUPER SCOOP had a raked bow.

RESPONSE NO. 6

The defendant denies that the Superscoop has a standard raked bow.

REQUEST NO. 7

The SUPER SCOOP was A.B.S. qualified.

RESPONSE NO. 7

The defendant admits the allegations contained in Request No. 7.

REQUEST NO. 8

The SUPER SCOOP had load line markings under American Bureau of Shipping Certificate No. 61-29, 944 and had inspection periodically.

RESPONSE NO. 8

The defendant admits the allegations contained in Request No. 8.

REQUEST NO. 9

The SUPER SCOOP was a documented vessel.

RESPONSE NO. 9

The defendant admits the allegations contained in Request No. 9.

REQUEST NO. 10

The SUPER SCOOP was Coast Guard inspected.

RESPONSE NO. 10

The defendant admits the allegations contained in Request No. 10.

REQUEST NO. 11

The SUPER SCOOP had navigation lights.

RESPONSE NO. 11

The defendant admits the allegations contained in Request No. 11.

REQUEST NO. 12

The SUPER SCOOP had deck engines.

RESPONSE NO. 12

The defendant admits that the Superscoop had deck engines but denies that the engines were for propulsion other than the short distances the Superscoop would be moved by its anchors.

REQUEST NO. 13

The SUPER SCOOP's purpose is for dredging operations.

RESPONSE NO. 13

The defendant admits the allegations contained in Request No. 13.

REQUEST NO. 14

The SUPER SCOOP mission was to dredge for the Third Harbor Tunnel.

RESPONSE NO. 14

The defendant admits the allegations contained in Request No. 14.

REQUEST NO. 15

The SUPER SCOOP had ballast tanks to maintain a seaworthy trim.

RESPONSE NO. 15

The defendant admits that the Superscoop had ballast tanks.

REQUEST NO. 16

The SUPER SCOOP had a head and an area for the crew to eat in.

RESPONSE NO. 16

The defendant admits the allegations contained in Request No. 16.

REQUEST NO. 17

Brad Shoffit was the captain of the SUPER SCOOP.

RESPONSE NO. 17

The defendant admits that Brad Shoffit was the person in charge of all employees on the Superscoop and was at times referred to as "Captain."

REQUEST NO. 18

Brad Shoffit hired and fired the members of the crew.

RESPONSE NO. 18

The defendant admits that Brad Shoffit was one of several employees of Dutra who had the authority to hire and fire employees working on the Superscoop.

REQUEST NO. 19

Crewmembers were required to wear life jackets.

RESPONSE NO. 19

The defendant admits that persons working on the Superscoop were required to wear life jackets.

REQUEST NO. 20

Crewmembers were transported to and from the SUPER SCOOP by a crew boat.

RESPONSE NO. 20

The defendant admits the persons working on the Superscoop were transferred to the Superscoop by boat.

REQUEST NO. 21

Captain Brad Shoffit considered Bill Kromhout to be a member of the crew of the SUPER SCOOP.

RESPONSE NO. 21

The defendant admits that at times the employees working on the Superscoop, including engineer Bill Kromhout, were referred to as members of a crew.

REQUEST NO. 22

Captain Brad Shoffit specifically asked to hire Malcolm Oldham as the operator.

RESPONSE NO. 22

The defendant admits that Malcolm Oldham was already employed on the Superscoop and was filling in on a regular basis as an operator. When a position for a full time operator became available, Brad Shoffit asked the union representative whether or not Malcolm Oldham could fill that position.

REQUEST NO. 23

Greasing the upper sheaves can be done externally of the housing but greasing the lower sheaves requires that you must get within the confines of the housing.

RESPONSE NO. 23

Objection on the grounds that the request is confusing, overly broad and subject to varying interpretations. There are many sheaves located upon the Superscoop.

REQUEST NO. 24

The lattice work does not prevent a person's body from entering the area where the plates go up and down.

RESPONSE NO. 24

Objection on the grounds that the request is confusing, overly broad and subject to varying interpretations.

REQUEST NO. 25

In order to grease the sheaves on the tag line tower, you grease from one side and then go to the other side of the tag line towers and grease from that side.

RESPONSE NO. 25

The defendant admits that this is usually the procedure followed by the engineer.

REQUEST NO. 26

Captain Shoffit believed that an operator must have good hearing and remembered that Malcolm Oldham had a hearing aide on December 14, 1992.

RESPONSE NO. 26

The defendant admits that Brad Shoffit testified at his deposition that in his opinion Malcolm Oldham was wearing a hearing aide on December 14, 1992. Brad Shoffit also testified that many persons working on a dredge because of the loud noise have imperfect hearing.

REQUEST NO. 27

Malcolm Oldham did not get a hearing aide until after this incident occurred.

RESPONSE NO. 27

The defendant is not able to admit or deny due to insufficient information at this time and will supplement after additional investigation and discovery.

REQUEST NO. 28

It is not noisy in the operator's cabin.

RESPONSE NO. 28

Objection on the grounds that the request is confusing and subject to varying interpretations. Specifically, what is noisy to one person is not noisy to another.

REQUEST NO. 29

Captain Shoffit was by himself at the Massachusetts General Hospital when he saw and talked to the plaintiff.

RESPONSE NO. 29

The defendant denies the allegations contained in Request No. 29.

REQUEST NO. 30

Malcolm Oldham told Captain Shoffit that Kromhout was trying to get the hose off when the injury occurred.

RESPONSE NO. 30

The defendant admits that Malcolm Oldham told Brad Shoffit that as far as he was aware Mr. Kromhout was trying to free his hose when the injury occurred and that Malcolm Oldham was not aware that Mr. Kromhout was performing greasing operations on the tag line counterweights until after the accident.

REQUEST NO. 31

Since there was no "lockout-tagout" in place on December 12, 1992 to perform the greasing of sheaves operation, the method to perform the greasing operation was through oral communication.

RESPONSE NO. 31

The defendant denies the allegations contained in Request No. 31.

REQUEST NO. 32

When greasing the counterweights, the upper sheaves can be greased from the outside because the grease fittings are accessible from outside the tower.

RESPONSE NO. 32

The defendant admits the allegations contained in Request No. 32.

REQUEST NO. 33

When greasing the counterweight, the lower sheaves can only be greased from the inside the tower.

RESPONSE NO. 33

The defendant admits that the proper procedure to grease the lower sheaves of the tag line counterweight was to make certain that the bucket was on deck before beginning greasing. At that time it was safe to place one's hands through the tower which housed the tag line counterweight.

REQUEST NO. 34

On December 14, 1992, the battery box was located farthest away from the operator on the side of the tower in which the counterweights go up and down.

RESPONSE NO. 34

The defendant admits the allegations contained in Request No. 34.

REQUEST NO. 35

At some time after December 14, 1992, the battery box was moved to its present location.

RESPONSE NO. 35

The defendant has insufficient knowledge upon which to base his response and will supplement this answer after further investigation and discovery.

REQUEST NO. 36

Mark Korkowski, while acting as an agent of Dutra Construction Company, Inc., signed and delivered APPLICATION FOR INSPECTION OF U.S. VESSEL (See Exhibit 1).

RESPONSE NO. 36

Although the defendant believes that Request No. 36 is an accurate statement, it is not able to admit or deny since no Exhibit 1 was attached to the Plaintiff's Request For Admissions.

REQUEST NO. 37

Dutra Construction Company, Inc. and SUPER SCOOP were under the jurisdiction of OSHA as of December 14, 1992.

RESPONSE NO. 37

Objection on the grounds that this request requires the defendant to make a legal conclusion which it is not qualified to make. Further, this is an issue to be decided by the fact finder at trial.

REQUEST NO. 38

The crane aboard the SUPER SCOOP has been an integral part of the barge since it was affixed.

RESPONSE NO. 38

The defendant admits the allegations contained in Request No. 38.

REQUEST NO. 39

Movement of the SUPER SCOOP was done by deck members and was done during the dredging operation as a necessary part of the dredging operation.

RESPONSE NO. 39

The defendant admits that the Superscoop would be moved a short distance by use of its anchors and deck engines during the dredging operation.

KENNETH W. SMITH, HEREBY CERTIFIES THE FOLLOWING: I AM GENERAL COUNSEL FOR DUTRA CONSTRUCTION COMPANY, INC., A DEFENDANT IN THE ABOVE-ENTITLED ACTION AND I SIGN THE FOREGOING RESPONSES TO REQUEST FOR ADMISSION FOR AND ON BEHALF OF THE SAID DEFENDANT AND AM DULY AUTHORIZED TO DO SO.

THE MATTERS STATED WITHIN THE FOREGOING RESPONSES TO REQUEST FOR ADMISSION ARE NOT WITHIN MY PERSONAL KNOWLEDGE AND I AM INFORMED THAT THERE IS NO SINGLE OFFICIAL OF DUTRA CONSTRUCTION COMPANY, INC. WITH PERSONAL KNOWLEDGE OF ALL SUCH MATTERS AND THAT THE MATTERS STATED IN THE FOREGOING RESPONSES TO REQUEST FOR ADMISSION HAVE BEEN ASSEMBLED BY REPRESENTATIVES OF THE DEFENDANT.

I AM INFORMED BY SAID REPRESENTATIVES THAT THE MATTERS SET FORTH IN THE AFORESAID RESPONSES TO REQUEST FOR ADMISSION ARE IN ACCORDANCE WITH THE INFORMATION POSSESSED BY THE DEFENDANT AND ARE TRUE RESPONSES AS FAR AS IT IS POSSIBLE TO VERIFY THEM.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 24th DAY OF JUNE, 1998.

DUTRA CONSTRUCTION
COMPANY, INC.

/s/ Kenneth W. Smith
By: Kenneth W. Smith,
General Counsel
Dutra Construction
Company, Inc.

AS TO OBJECTIONS:

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
BBO # 544538
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110
617/951-2100

CERTIFICATE OF SERVICE

I Frederick E. Connelly, Jr., hereby certify that I have this 25 day of June, 1998, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

David P. Kaplan, Esq.
The Kaplan/Bond Group
Boston Fish Pier
West Building, Suite 304
P.O. Box 1404
Boston, MA 02205-1404

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

UNITED STATES COAST GUARD CERTIFICATES OF INSPECTION FOR SUPER SCOOP (ORIGINALLY ATTACHED AS EXHIBIT D TO PLAINTIFF'S MOTION FOR REHEARING)

WILLARD T. STEWART
V.
DUTRA CONSTRUCTION CO., INC. CIVIL ACTION NO. 95-11046-RCL
(D.MASS. FILED: OCTOBER 6, 1999)

CERTIFICATION DATE: 10JAN94

EXPIRATION DATE: 10JAN96

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

[SEAL] **Certificate of Inspection**

VESSEL NAME SUPER SCOOP	OFFICIAL NUMBER D574373
CALL SIGN	SERVICE INDUSTRIAL VESSEL
HOME PORT SAN FRANCISCO, CA	HULL MATERIAL STEEL
HORSEPOWER	PROPULSION
PLACE BUILT MERMENTAU, LA	DATE BUILT 01JAN76
GROSS TONS 1290	NET TONS 1290
DWT	LENGTH 176.00
OWNER DUTRA CONSTRUCTION CO INC	OPERATOR DUTRA CONSTRUCTION CO INC

1000 POINT SAN PEDRO RD
SAN RAFAEL, CA 94901

1000 POINT SAN PEDRO RD
SAN RAFAEL, CA 94901

THIS VESSEL MUST BE MANNED WITH THE FOLLOWING LICENSED AND UNLICENSED PERSONNEL INCLUDED IN WHICH THERE MUST BE 0 CERTIFICATED LIFEBOATMEN AND 0 CERTIFICATED TANKERMAN.

___ MASTER
___ CHIEFMATE
___ 2ND MATE
___ MATES
___ ABLE SEAMEN
___ ORDINARY SEAMEN
___ DECKHANDS
___ _____
___ FIREMEN-WATERTENDERS
___ OILERS
___ _____

___ MASTER & 1ST CLASS PILOT
___ CLASS PILOT
___ RADIO OFFICER(S)
___ OPERATOR(S)
___ CHIEF ENGINEER
___ 1ST ASST.ENGINEER
___ 2ND ASST. ENGINEER
___ ENG'RS.

IN ADDITION, THIS VESSEL MAY CARRY 0 PASSENGERS, 0 OTHER PERSONS IN CREW, 0 PERSONS IN ADDITION TO CREW, AND NO OTHERS. TOTAL PERSONS ALLOWED: 0

ROUTE PERMITTED AND CONDITIONS OF OPERATION:

–OCEANS–

UNMANNED.

****

–RIVERS–

VESSEL MAY CARRY UP TO 10 INDUSTRIAL PERSONNEL WHEN OPERATING ON PROTECTED WATERS. ALL PERSONS SHALL WEAR COAST GUARD APPROVED PERSONAL FLOATATION DEVICES WHILE ON DECK.

WHILE VESSEL IS MANNED A RESCUE VESSEL (M/V HUMMINGBIRD) SHALL BE STANDING BY

****

NO MORE THAN 466 SHORT TONS OF DECK CARGO MAY BE CARRIED. THE VERTICAL CENTER OF GRAVITY OF THIS DECK CARGO MUST NOT EXCEED SIX FEET ABOVE THE DECK. CARGO MUST BE POSITIVELY SECURED AGAINST SHIFTING BEFORE LEAVING PROTECTED WATERS.

***SEE NEXT PAGE FOR ADDITIONAL CERTIFICATE INFORMATION ***

WITH THE INSPECTION HAVING BEEN COMPLETED AT CAPE CANAVERAL, FLORIDA

CERTIFIED BY THE OFFICER IN CHARGE MARINE INSPECTION, JACKSONVILLE, FL

WITH THE APPLICABLE VESSEL, INSPECTION LAWS AND THE RULES AND REGULATIONS PRESCRIBED THEREUNDER.

ON 10JAN90 THIS VESSEL IS TO BE IN ALL RESPECTS IN CONFORMITY

PERIODIC REINSPECTIONS

DATE	ZONE	SIGNATURE

THIS CERTIFICATE ISSUED BY:
A. REGALBUTO, CAPTAIN, USCG

OFFICER IN CHARGE, MARINE INSPECTION
JACKSONVILLE, FL
INSPECTION ZONE

–HULL EXAMS–

–EXAM TYPE–	–NEXT EXAM–
DRYDOCK	31JAN95
INTERNAL STRUCTURAL	31DEC94
–LAST EXAM–	**–PRIOR EXAM–**
26APR93	08JAN90
18DEC91	08JAN90

–STABILITY–

LETTER APPROVAL DATE/22DEC87 OFFICE/GMSC

–INSPECTION STATUS–

PRESSURE VESSELS

TYPE	LOCATION	LAST	NEXT
AIR RECEIVER	CRANE MACH SPAC	10JAN94	10JAN96
AIR RECEIVER	MAIN DECK COMP	10JAN94	10JAN96

–LIFESAVING EQUIPMENT–

	NUMBER PERSONS
TOTAL EQUIPMENT FOR LIFEBOATS (TOTAL)...	10
LIFEBOATS (PORT)*	
LIFEBOATS (STARBD)*	
MOTOR LIFEBOATS*	
LIFEBOATS W/RADIO*	
RESCUE BOATS/PLATFORMS	1
INFLATABLE RAFTS	
LIFE FLOATS/BOUYANT APP WORKBOATS (NOT REQUIRED)	

	REQUIRED
LIFE PRESERVERS (ADULT)	10
LIFE PRESERVERS (CHILD)	
RING BUOYS (TOTAL)	2
WITH LIGHTS*	2
WITH LINE ATTACHED*	2
OTHER*	
IMMERSION SUITS	
PORTABLE LIFEBOAT RADIOS	
EQUIPPED WITH EPIRB?	NO

(*INCLUDED IN TOTALS)

–FIRE FIGHTING EQUIPMENT–

FIXED EXTINGUISHING SYSTEMS

SPACE PROTECTED	AGENT	CAPACITY
FUEL TRANSFER ROOM/ MAIN DECK	CO2	50

FIRE EXTINGUISHERS – HAND PORTABLE AND SEMI-PORTABLE

A-II	B-I	6 B-II	B-III
B-IV	B-V	C-I	C-II

END

Department of Transportation
United States Coast Guard
Washington, D.C. 20593-0001

[SEAL] [SEAL]

CERTIFICATE OF FINANCIAL RESPONSIBILITY (WATER POLLUTION)

KNOW ALL PERSONS BY THESE PRESENTS THAT ___ No. 830 416-07 Vessel Operator DUTRA CONSTRUCTION CO., INC. has established financial responsibility to meet liability under section 311(p) of the Federal Water Pollution Control Act, as amended, which may result from the operation of the vessel named below:

Name of Vessel

SUPER SCOOP Expires FEB 20, 1995

The use of this certificate is subject to the provisions of Part 130 of Title 33 of the Code of Federal Regulations, as it is or may be amended, and the conditions on the reverse of this Certificate. This Certificate is void if there are any erasures or alterations hereon, and is void if the operator named hereon is not the party responsible for operating the vessel.

/s/ Robert M. Skall
Assistant Chief, Marine
Environmental Response
Division
Office of Marine Safety,
Security and
Environmental Protection
By Direction of the Commandant,
U.S. Coast Guard

United States of America
Department of Transportation
United States Coast Guard

[SEAL] TEMPORARY CERTIFICATE OF INSPECTION

This Temporary Certificate of Inspection is issued under the provisions of Title 46 United States Code Section 3309 in lieu of the regular certificate of inspection, and shall be in force only until the receipt or board said vessel of the original certificate of inspection, this certificate in no case to be valid after one year from the date of inspection.

VESSEL	OFFICIAL NUMBER
SUPER SCOOP	D574 373

CLASS	GROSS TONS	HOMEPORT
INDUSTRIAL VESSEL	1290	SAN FRANCISCO, CA

OWNER/ADDRESS	OPERATOR/ADDRESS
DUTRA CONSTRUCTION COMPANY INC.	DUTRA CONSTRUCTION COMPANY INC.
2199 CLEMENT AVENUE	2199 CLEMENT AVENUE
ALAMEDA, CA. 94501	ALAMEDA, CA. 94501

The following complement of licensed officers and crew is required to be carried; included in which there must be ___ Certificated Lifeboatmen and ___ Certificated Tankermen:

___	Master	___	Master & 1st Class Pilot
___	Chief Mate	___	Class Pilot
___	2nd Mate	___	Radio Officer
___	Mate(s)	___	Operator(s)
___	Able Seamen	___	Chief Engineer
___	Ordinary Seamen	___	1st Asst. Engineer
___	Deckhands	___	2nd Asst. Engineer
___	_____	___	___ Engineer(s).

___ Firemen-Watertenders
___ Oilers
___ _____

In addition, this vessel may carry ___ other persons in crew, ___ passengers, ___ persons in addition to the crew, and ___. Total persons allowed 0.

Maximum steam pressure allowed N/A p.s.i.

DATE DAY DOCK NO. 26APR98

ROUTE PERMITTED AND CONDITIONS OF OPERATION

–OCEANS–

UNMANNED

–RIVERS–

VESSEL MAY CARRY UP TO TEN (10) INDUSTRIAL PERSONNEL WHEN OPERATING ON PROTECTED WATERS ALL PERSONNEL SHALL WEAR COAST GUARD APPROVED PERSONNEL FLOATATION DEVICES WHILE ON DECK.

WHILE VESSEL IS MANNED A RESCUE VESSEL (M/V HUMMINGBIRD) SHALL BE STANDING, BYE.

NO MORE THAN 446 SHORT TONS OF DECK CARGO MAY BE CARRIED THE VERTICAL CENTER OF GRAVITY OF THIS CARGO SHALL NOT EXCEED (6) SIX FEET ABOVE THE DECK, CARGO MUST BE POSITIVELY SECURED AGAINST SHIFTING BEFORE LEAVING PROTECTED WATER.

Inspection of the above vessel, was completed on 10 JANUARY 1994 DH I, HEREBY CERTIFY that on this date the vessel was in all respects in conformity with applicable vessel inspection laws and regulations prescribed thereunder.

OFFICER IN CHARGE MARINE INSPECTION
A. REGALBUTO, CAPTAIN, USCG

INSPECTION ZONE
JACKSONVILLE, FLORIDA

_____

CERTIFICATION DATE: 12DEC91

EXPIRATION DATE: 12DEC93

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

[SEAL] **Certificate of Inspection**

VESSEL NAME SUPER SCOOP	OFFICIAL NUMBER D574373
CALL SIGN	SERVICE INDUSTRIAL VESSEL
HOME PORT SAN FRANCISCO, CA	HULL MATERIAL STEEL
HORSEPOWER	PROPULSION
PLACE BUILT MERMENTAU, LA	DATE BUILT 01JAN76
GROSS TONS 1290	NET TONS 1290
DWT	LENGTH 176.00

OWNER
DUTRA CONSTRUCTION CO INC
2199 CLEMENT AVENUE
ALAMEDA, CA 94501

OPERATOR
DUTRA CONSTRUCTION CO INC
2199 CLEMENT AVENUE
ALAMEDA, CA 94501

THIS VESSEL MUST BE MANNED WITH THE FOLLOWING LICENSED AND UNLICENSED PERSONNEL INCLUDED IN WHICH THERE MUST BE Q CERTIFICATED LIFEBOATMEN AND Q CERTIFICATED TANKERMAN.

___ MASTER
___ CHIEFMATE
___ 2ND MATE
___ MATES
___ ABLE SEAMEN
___ ORDINARY SEAMEN
___ DECKHANDS
___ _____
___ FIREMEN-WATERTENDERS
___ OILERS
___ _____

___ MASTER & 1ST CLASS PILOT
___ CLASS PILOT
___ RADIO OFFICER(S)
___ OPERATOR(S)
___ CHIEF ENGINEER
___ 1ST ASST. ENGINEER
___ 2ND ASST. ENGINEER
___ ___ ENG'RS.

IN ADDITION, THIS VESSEL MAY CARRY Q PASSENGERS, Q OTHER PERSONS IN CREW, Q PERSONS IN ADDITION TO CREW, AND NO OTHERS. TOTAL PERSONS ALLOWED: Q

ROUTE PERMITTED AND CONDITIONS OF OPERATION:

–OCEANS–

UNMANNED.

****

–RIVERS–

VESSEL MAY CARRY UP TO 10 INDUSTRIAL PERSONNEL WHEN OPERATING ON PROTECTED WATERS. IN BOSTON HARBOR BETWEEN EAST BOSTON AND SOUTH BOSTON UNDER REASONABLE OPERATING CONDITIONS. ALL PERSONS SHALL WEAR COAST GUARD APPROVED PERSONAL FLOATATION DEVICES WHILE ON DECK.

WHILE VESSEL IS MANNED A RESCUE VESSEL (M/V CASTINE) SHALL BE STANDING BY.

****

NO MORE THAN 466 SHORT TONS OF DECK CARGO MAY BE CARRIED. THE VERTICAL CENTER OF GRAVITY OF THIS DECK CARGO MUST NOT EXCEED SIX FEET ABOVE THE DECK. CARGO MUST BE POSITIVELY SECURED AGAINST SHIFTING BEFORE LEAVING PROTECTED WATERS.

***SEE NEXT PAGE FOR ADDITIONAL CERTIFICATE INFORMATION ***

WITH THE INSPECTION HAVING BEEN COMPLETED AT BOSTON, MASSACHUSETTS

CERTIFIED BY THE OFFICER IN CHARGE MARINE INSPECTION, BOSTON, MASSACHUSETTS

WITH THE APPLICABLE VESSEL, INSPECTION LAWS AND THE RULES AND REGULATIONS PRESCRIBED THEREUNDER.

ON 12DEC91 THIS VESSEL IS
TO BE IN ALL RESPECTS IN CONFORMITY

PERIODIC REINSPECTIONS

DATE	ZONE	SIGNATURE

THIS CERTIFICATE ISSUED BY:
/s/ W. H. Boland, Jr.
W. H. BOLAND, JR. CAPTAIN, USCG

OFFICER IN CHARGE, MARINE INSPECTION
BOSTON, MASSACHUSETTS
INSPECTION ZONE

–HULL EXAMS–

–EXAM TYPE–	-NEXT EXAM-
DRYDOCK	31JAN93
INTERNAL STRUCTURAL	31DEC94
–LAST EXAM–	**–PRIOR EXAM–**
08JAN90	29APR87
18DEC91	08JAN90

–STABILITY–

LETTER APPROVAL DATE/22DEC87 OFFICE/GMSC

–INSPECTION STATUS–

PRESSURE VESSELS

TYPE	LOCATION	LAST	NEXT
AIR RECEIVER	MACHINERY SPACE	12DEC91	12DEC93
AIR RECEIVER	PUMP ROOM	12DEC91	12DEC93

–LIFESAVING EQUIPMENT–

	NUMBER PERSONS
TOTAL EQUIPMENT FOR LIFEBOATS (TOTAL)...	10
LIFEBOATS (PORT)*	
LIFEBOATS (STARBD)*	
MOTOR LIFEBOATS*	
LIFEBOATS W/RADIO*	
RESCUE BOATS/PLATFORMS	1
INFLATABLE RAFTS	
LIFE FLOATS/BOUYANT APP WORKBOATS (NOT REQUIRED)	
	REQUIRED
LIFE PRESERVERS (ADULT)	10
LIFE PRESERVERS (CHILD)	
RING BUOYS (TOTAL)	2
WITH LIGHTS*	2
WITH LINE ATTACHED*	2
OTHER*	
IMMERSION SUITS	
PORTABLE LIFEBOAT RADIOS	
EQUIPPED WITH EPIRB?	NO

(*INCLUDED IN TOTALS)

–FIRE FIGHTING EQUIPMENT–

FIRE EXTINGUISHERS – HAND PORTABLE AND SEMI-PORTABLE

A-II	B-I	6 B-II	B-III
B-IV	B-V	C-I	C-II

–CERTIFICATE AMENDMENTS–

PORT AMENDING/BOSMS

DATE AMENDED/07FEB92

–AMENDMENT–

DRYDOCK INTERVAL CHANGED FROM ONCE IN 5 YEARS TO TWICE IN 5 YEARS DUE TO PERMISSIVE MANNING

END

INTERNATIONAL LOAD LINE CERTIFICATE BY THE AMERICAN BUREAU OF SHIPPING FOR THE SUPER SCOOP (ORIGINALLY ATTACHED AS EXHIBIT E TO PLAINTIFF'S MOTION FOR REHEARING)

WILLARD T. STEWART
V.
DUTRA CONSTRUCTION CO., INC.
CIVIL ACTION NO. 95-11046-RCL
(D.MASS. FILED: OCTOBER 6, 1999)

INTERNATIONAL LOAD LINE CERTIFICATE (1966)

Issued under the provisions of the International Convention on Load Lines, 1966, under the authority of the Government of the

[SEAL] UNITED STATES OF AMERICA,
Commandant, U. S. Coast Guard,

by the American Bureau of Shipping
duly authorized for assigning purposes under the provisions of the Convention

7609467-2
Certificate No.

Name of Ship	Official number or Distinctive Letters
SUPER SCOOP	574,373

Port of Registry	Length (L) as defined in Article 2 (8); i.e., 46 CFR 42.13-15
ALAMEDA	168'-11-1/2"

Freeboard assigned as: • (A new ship
• (Delete whatever
(is inapplicable.

Type of Ship • (Type "B" with
(increased freeboard

Freeboard from deck line

Tropical	5	feet	2	inches (T)
Summer	5	feet	3-⅝	inches (S)
Winter	5	feet	5-¼	inches (W)
Winter: North Atlantic	5	feet	7-¼	inches (WNA)

Load Line

1-⅝ inches above (S)
Upper edge of line at level of center of rim
1-⅝ inches below (S)
3-⅝ inches below (S)

Note: Freeboards and load lines which are not applicable need not be entered on the certificate.

Allowance for fresh water for all freeboard 1-⅝ inches.

Note: All measurements are to upper edge of the respective horizontal lines.

The upper edge of the deck line from which these freeboards are measured is OPPOSITE TOP OF STEEL UPPER deck at side.

NOTE:

STABILITY OF THIS VESSEL HAS BEEN CHECKED AND FOUND SATISFACTORY PROVIDED THE RESTRICTIONS SET FORTH IN THE ATTACHED STABILITY LETTER DATED 14 JULY 1977 ARE OBSERVED.

THIS CERTIFICATE IS VALID FOR UNMANNED OPERATION ONLY.

Date of initial or periodical survey 26 FEBRUARY 1981

THIS IS TO CERTIFY that this ship has been surveyed and that the freeboards have been assigned and load lines shown above have been marked in accordance with the International Convention on Load Lines, 1966.

This Certificate is valid until 26 FEBRUARY 1986 **, subject to annual surveys in accordance with Article 14(1)(c) of the Convention, and endorsement thereof on the reverse side of the Certificate.

**At the expiration of this certificate, applicable reissuance should be obtained in accordance with the Load Line Regulations.

[SEAL]

Issued at New York, N.Y. 1 JUNE 1981

The undersigned declares that he is duly authorized by the said Government to issue this Certificate.

/s/ A.M. Crahan
A.M. CRAHAN,
ASSISTANT SECRETARY
American Bureau of Shipping

ANNUAL SURVEYS

THIS IS TO CERTIFY that at an annual survey required by Article 14(1)(c) of the Convention, this ship was found to comply with the relevant provisions of the Convention.

Place _____ Date _____

_____ Surveyor to the American Bureau of Shipping

(Signature)

Place Richmond California Date 31 August 1983

K.Kaufman Surveyor to the American Bureau of Shipping

(Signature)

Place San Diego, CA. Date 3 October 1984

/s/ [Illegible] Surveyor to the American Bureau of Shipping

(Signature)

Place _____ Date _____

_____ Surveyor to the American Bureau of Shipping

(Signature)

EXTENSION OF LOAD LINE CERTIFICATE

The provisions of the Convention being fully complied with by this ship, the validity of this Certificate is, in accordance with Article 19(2) of the Convention, extended until _____

Place _____ Date _____

_____ Surveyor to the American Bureau of Shipping

(*Signature*)

Notes:

1. When a ship departs from a port situated on a river or island waters, deeper loading shall be permitted corresponding to the weight of fuel and all other materials

required for consumption between the point of departure and the sea.

2. When a ship is in fresh water of unit density the appropriate load line may be submerged by the amount of the fresh water allowance. Where the density is other than unity, an allowance shall be made proportional to the difference between 1.025 and the actual density.

3. It is the owner's responsibility to furnish the master wit approved information and instructions for loading and ballasting this vessel to provide guidance as to stability of the vessel under varying conditions of service and to avoid unacceptable stresses in the vessel's structure, as defined in 46 CFR 42.09-1.

4. The Winter North Atlantic Load Line applies only to vessels of 328 ft. in length or less, which enter any part of the North Atlantic Ocean during the winter months as defined by the Load Line Regulations in 46 CFR 42.30-5 and 42.30-35. The periods during which the other seasonal load lines apply in different parts of the world are as stated in the Load Line Regulations of 46 CFR 42.30-5 to 42.30-30, inclusive.

5. This Load Line Certificate will be canceled by the Commandant, U.S. Coast Guard, if –

(a) The annual surveys have not been carried out within three months either way of each anniversary date of the certificate.

(b) The certificate is not endorsed to show that the ship has been surveyed as indicated in (a).

(c) Material alterations have been made to the hull or superstructures such as would necessitate the assignment of an increased freeboard.

(d) The fittings and appliances for the protection of the openings, guardrails, freeing ports, or the means of access to the crew's quarters have not been in as effective a condition as they were when the Certificate was issued.

(e) The structural strength of the ship is lowered to such an extent that the ship is unsafe.

6. When this Certificate has expired or been canceled, it must be delivered to the assigning Authority.

SECTION 148 OF DUTRA CONSTRUCTION CO., INC.'S CONTRACT FOR DREDGING (ORIGINALLY ATTACHED AS EXHIBIT F TO PLAINTIFF'S MOTION FOR REHEARING)

WILLARD T. STEWART

V.

DUTRA CONSTRUCTION CO., INC.
CIVIL ACTION NO. 95-11046-RCL
(D.MASS. FILED: OCTOBER 6, 1999)

SECTION 148

DREDGING

Item No.	Description	Unit
148.01	Dredging (Alt. 1)	CY
148.02	Dredging (Alt. 2)	CY
148.31	Removal and Disposal of Ledge (Alt.1)	CY
148.32	Removal and Disposal of Ledge (Alt.2)	CY

Except as indicated below and on the Plans, all work shall be in accordance with the pertinent requirements of Standard Specifications Section 148, Dredging.

DESCRIPTION

ADD THE FOLLOWING TO SECTION 148.20 GENERAL

148.20 GENERAL

When the nature of the material to be dredged requires blasting, the Contractor's blasting program and methods shall be those necessary to accomplish the dredging shown on the Contract Drawings in accordance with the procedures specified herein. The Contractor will be required to make necessary plans, examinations, surveys, test blasts

to determine the quantity of explosives that can be fired, and thereafter control the quantity of explosives in any one blast.

The foundation course method shall consist of either screeded gravel (Alternate 1) or sand placed by pumping methods (Alternative 2). The two methods require different amounts of dredging.

The Work of this Section also includes furnishing, installing and maintaining geotechnical instrumentation as shown on the plans and collecting, reducing, plotting, interpreting and reporting instrumentation data for both the Contractor installed instrumentation and the instrumentation installed by the Department's Management Consultant prior to award of this Contract.

ADD THE FOLLOWING NEW SECTIONS:

148.26 APPLICABLE PUBLICATIONS

The Contractor shall comply fully with all state, local and federal regulations including, but not limited to, the following regulations and reports:

A. Code of Massachusetts Regulations, 527 CMR: Board of Fire Prevention Regulations.

B. Organized Crime Control Act of 1970, Title XI, Regulation of Explosives (P.L. 91-452).

C. Commerce in Explosives, Part 181 of Title 26, Code of Federal Regulations.

D. Safety and Health Regulations for Construction, Title 29, Labor Chapter XVII, Bureau of Labor Standards, Department of Labor Parts 1910 and 1926.

E. Interstate Commerce Commission Regulations.

F. Applicable U.S. Coast Guard Regulations and state, county, municipal, or port authority codes, rules, regulations and laws.

G. Federal Register, Volume 36, Number 10, 15 January 1971, Department of the Treasury.

H. The Erosion and Sedimentation Control Plan (Exhibit II-C).

I. USDOT Geotechnical Engineering Notebook, Geotechnical Guideline No. 7, Guide Controlled Blasting Specification.

Should two regulations or requirements conflict, the most stringent shall apply.

148.27 MATERIAL TO BE REMOVED

The material to be removed includes hard material. Hard material is defined as material requiring blasting or the use of special equipment for economical removal, and includes boulders or fragments too large to be removed in one piece by the dredge. All such material shall be considered ledge for the purpose of measurement and payment.

148.28 ARTIFICIAL OBSTRUCTIONS

Except as indicated on the Plans, the Department has no knowledge of cables, pipes, or other artificial obstructions or of any wrecks, wreckage, or other material.

Contractor is alerted to the fact that the Subaru area was previously utilized to dock and repair U.S. Naval vessels. It is not known whether munitions were deposited in this area. Contractor is to exercise care when excavating and dredging this area and take necessary precautions to protect its workers and equipment during the progress of the work. Should munitions be discovered by the Contractor, the

situation will be considered a changed condition and will be addressed in accordance with Section 4.03. Contractor shall excavate down approximately 40 feet to original pier depth and conduct investigations prior to continuing the Work. Investigation plan is to be submitted to the Engineer for approval.

148.29 PERMITS

The Contractor shall comply with all conditions and requirements of the Corps of Engineers Permit and other local, state or federal permits. The Department will secure the permit for all dredging. The Department will secure the permit for disposal of material designated for the Massachusetts Bay Disposal Site. The Contractor shall obtain all other permits required by the work.

The Contractor shall be responsible for obtaining all licenses, permits, and approvals, and the keeping of accounts and records, as well as arranging the transportation and protection of all explosives used for the work. Should the Contractor fail to comply with above requirements, the Engineer may order a suspension of that part of work involved until the deficiencies are corrected. The Contractor will not be entitled to additional compensation for suspension of the work due to its own deficiencies.

148.30 SUBMITTALS AND COORDINATION OF WORK

A. The Contractor shall submit to the Engineer for review, detailed information on proposed equipment, methods, and sequence of operations.

B. The Contractor shall prepare a blasting plan. Blasting plan shall include a test blasting plan as described herein. The blasting plan shall include the following:

1. Contractor shall submit a Test Blasting Plan to the Engineer and U.S. Coast Guard for review and acceptance. No blasting shall occur until the Blasting Plan is accepted by the Engineer and the U.S. Coast Guard.
2. The Contractor shall submit a weekly blasting operation schedule to facilitate monitoring of the effects of blasting operations.
3. The Contractor shall hold weekly coordination meetings with adjacent property owners, public agencies, local authorities, and mariners during the dredging and blasting operations.
4. The Contractor shall submit a Blasting Plan which includes, as a minimum:
   a. Proposed method of transportation, storage, and handling of explosives.
   b. Procedure for monitoring the blast operations and handling misfires.
   c. Location, size, depth, maximum charge weight per delay and round and spacing of blast holes, type of explosive and method of loading and detonating, stemming, and maximum number of holes to be detonated per blast. Additionally, type of blasting equipment to be used and when last tested.
   d. Type of instrumentation to be used, manufactured, and when last calibrated and/or certified.
   e. List of licenses, permits and/or clearances required, when applied for, and date of approval or anticipated approval by federal, state, and local concerns.

f. A format for maintaining a record of individual blasts (i.e., the "Daily Blasting Log") throughout the life of the job designed to record pertinent data before, during, and after the blasting operation.

g. Names and qualifications of specialists for vibration control analysis. Names and addresses of all certified blasters and users.

h. Plan showing location and warning signs and signals to be used. Method of controlling vessel traffic and communications.

i. Name and address of Contractor's representative to which any claims for damage due to blasting should be addressed.

j. Prior to commencing the work, the Contractor shall prepare a Test Blast Plan. This Plan shall include the planned test patterns and weights of explosives of each test blast, with anticipated peak particle velocities at structures most likely to be affected from the test blast. The results of the Test Blast Program will determine the allowable Contractor production rates.

k. Sequence of blasting, lifts (if used), direction of advance, description of equipment, schedule, and restricted zones.

l. Location of blast monitoring instruments. Contractor to monitor blast vibrations at all structures located within a 1,000-foot radius of the limits of the work.

m. The requirements of paragraph 148.67. C.1

C. Schedules for blasting shall be thoroughly coordinated with the proper federal, state and local authorities,

General Ship Corporation and the New England Aquarium. No blasting will be done unless approved by the Engineer.

D. The Contractor will be required to obtain all necessary permits from the local authorities to perform blasting operations. The Engineer shall be notified in writing that all permits have been obtained, and shall be furnished with copies prior to commencement of blasting operations.

E. Work in areas adjacent to the ship channel shall be coordinated with the U.S. Coast Guard and the Commonwealth of Massachusetts Port Authority and the Boston Harbormaster.

F. Report of Loss: Should a loss or theft of explosives occur, all circumstances and details shall be immediately reported to the nearest office of the (ATF) Alcohol, Tobacco, Firearms as well as to the local law enforcement authorities and the Engineer.

G. At least 30 days prior to installing each geotechnical instrument, submit to Engineer for approval the type of equipment, planned location, installation schedule and monitoring schedule for that instrument.

H. Within 5 days of installing each geotechnical instrument, submit to Engineer as-built location as specified, and installation record sheet.

I. When readings indicate ground or structure movement the Engineer shall be notified immediately. Within 24 hours of reading an instrument, submit to Engineer raw, reduced and plotted data on all readings.

J. At least 15 days prior to commencement of any dredging work the Contractor shall submit:

1. Manufacturers' product data on all instruments specified herein, including any requests for consideration of substitutions, as specified herein, and warranty provisions.
2. Detailed step-by-step procedures, for all instruments specified herein, for:
   - factory calibration
   - pre-installation acceptance tests
   - installation
   - post-installation acceptance tests
   - protection from damage
   - maintenance of readout units
   - field calibration of readout units
   - maintenance of installed components
   - collection of initial data
   - collection of subsequent data
   - data reduction
   - data processing
   - data plotting
   - data reporting
   - coordination with the Engineer to ensure compatibility of collected data
   - data interpretation

   together with all required field and office forms. The installation procedures shall include lists of tools and materials required, and specifications for

required grout mixes. Field calibration procedures shall include schedules.

K. Within 2 Days of receipt of each instrument at the site, submit to Engineer copy of factory calibration, manufacturer's test equipment certification and completed copy of quality insurance checklist.

L. Within 2 Days of receipt of the first of each instrument type, submit to Engineer the manufacturer's instruction manual for that instrument.

M. Within 14 Days of receipt of each instrument at the site, submit to Engineer result of pre-installation acceptance test.

N. Within 14 Days after award of the Contract, submit to the Engineer for approval resumes of geotechnical engineering specialist(s) sufficient to define details of direct site experience, with names and telephone numbers of individuals who can be contacted for references.

O. Contractor shall submit munitions excavation plan to the Engineer prior to excavating/dredging beyond 40 foot depth.

148.31 ENVIRONMENTAL PROTECTION

The Contractor shall provide, and maintain during the life of the Contract, environmental protective measures. The Contractor shall also provide clean up of oil spills and debris, that occur during the dredging operations and maintenance of the trench in accordance with Section 7.02. The Contractor shall comply with all federal, state, and local regulations pertaining to water, air, and noise pollution and the requirements of these Special Provisions.

The Contractor will provide a fisheries biologist to the Engineer to monitor fish runs and report on any possible

fish kills from the blasting operations during the full duration of the blasting operations. The Contractor shall cooperate with the biologist in observations and collection of any dead fish by providing a boat and operator as needed during blasting operations. No separate payment will be made for use of the boat and operator. All costs associated with this work will be included in the Unit Prices for Payment Items of this Section.

148.32 RESPONSIBILITIES

A. General: The Contractor shall be responsible for the blasting program and methods necessary to accomplish the dredging shown on the Contract Drawings in accordance with the procedures specified herein. The Contractor will be required to make necessary plans, examinations, surveys, and test blasts to determine the quantity of explosives that can be fired without damaging property, and to thereafter control the quantity of explosives fired in any one blast to prevent injuries to persons or damage to structures, homes, utilities, vehicles, vessels moored or underway, or any property.

B. The Contractor shall, in addition, process any and all claims of private citizens arising out of said use of explosives promptly; in particular, all property damage claims shall be acknowledged by the Contractor immediately, and the claimed damage inspected within thirty (30) days following initial notification.

C. Public Meeting: The Contractor shall have specialists qualified in vibration and airblast control available for up to three (3) days if requested to prepare for and participate in a public meeting, conducted by the Engineer to better inform the public about anticipated drilling and blasting operations.

D. Preblast and Postblast Survey: The Contractor shall provide a specialist on vibration control to work with a representative of the Engineer in making a preblast structural survey. All structures located within 1000 ft of the work will be inspected and their condition documented. Any existing outstanding architectural defects, such as broken or fallen plaster or broken windows, shall be photographically documented.

During the blasting phase, the Contractor shall conduct a structural survey of all structures located within 1000 ft of the work and document their condition and any changes thereto. Such post-blast survey shall be conducted on a monthly basis at a minimum.

E. Instrumentation:

The Contractor shall:

1. Furnish components of instrumentation that are to be installed during construction as shown on the plans and specified herein.
2. Furnish portable readout instruments for the Contractor's use.
3. Furnish portable readout instruments for the Engineer's use. This equipment will be returned to the Contractor upon completion of the work.
4. Install, protect from damage, and maintain installed components of instrumentation during construction.
5, Maintain and calibrate portable readout instruments for the Contractor's and Engineer's use.
6. Collect, reduce, process, plot, and report data. These tasks are referred to herein as the Contractor's monitoring program.
7. Provide access to the Engineer for data collection.

8. Coordinate with the Engineer to ensure compatibility of collected data.

9. Interpret data resulting form both the Engineer's and the Contractor's monitoring programs.

10. Implement recommendations developed from interpretations of monitoring program data.

F. Vibration Specialist shall be employed to monitor vibration levels at all buildings located within 1000 ft radius of the work.

148.33 QUALIFICATIONS OF PERSONNEL

A. Personnel:

1. The Contractor shall obtain a blasting permit from the Boston Fire Department. The operator shall exhibit a certificate of competence and evidence of a valid blasting bond.

2. The Contractor shall retain a specialist qualified in vibration control methods who is capable of analyzing results obtained from seismograph readings and who has a minimum of three years of direct field experience monitoring the type of construction specified herein. Specialist shall be subject to the Engineer's acceptance.

3. The Contractor shall provide a geotechnical engineering specialist with five years minimum relevant experience, to furnish and install all geotechnical instrumentation, to maintain and calibrate instrumentation as required, and to collect, reduce, process, plot, interpret and report data to the Engineer. Specialist shall be accepted by the Engineer.

4. The Contractor shall also provide a survey specialist to make survey measurements for vertical and

lateral deformation monitoring. Specialist shall be accepted by the Engineer.

MATERIALS

ADD THE FOLLOWING:

148.34 GEOTECHNICAL INSTRUMENTATION

A. Inclinometer

1. Provide inclinometer probe, cable, pulley assembly, cable hold, and readout unit with overall sensitivity of ±0.0001- foot lateral movement per two feet of casing. A minimum of two probes, cables, pulley assemblies, cable holds and indicators shall be provided for the Contractor's monitoring program, and one of each for the Engineer's monitoring program. The probe shall have two servo accelerometers in waterproof housing. One accelerometer will have sensing axis in the plane of the spring loaded wheels which ride in the casing grooves. The second accelerometer will sense at 90° (π/2 rad) so that the angle of inclination of sensor and casing is measured in the orthaganal direction. Cable should be 125 feet long. Indicator shall be portable, battery powered, microprocessor-based computer, to record, check and reduce data. Permanent storage of the database will be on 3.5-inch disk. Indicator shall be contained in study case with watertight and dustproof construction.

2. Provide inclinometer casing 2.75 in. o.d. ABs plastic with four internal longitudinal grooves, precisely manufactured to fit probes' wheel dimensions. The grooves shall be spaced on the inside circumference of the casing at 90° (π/2 rad) forming symmetrical relationship between successive casing sections.

Couplings shall be low profile slip type with permanent internal alignment key.

Readout unit shall be Digitilt PC as manufactured by Slope Indicator Co. or Inclinometer Data Logger as manufactured by Geo Group, Inc., or acceptable equivalent. The time interval between recordings two feet apart in the casing shall be such that the reading stabilizes to within ±1 unit of display within 8 seconds. Readout unit shall include a battery charger.

Provide one set of inclinometer software, GTILT, as supplied by Mite Software Corporation, Edmonton, Alberta, or acceptable equivalent.

3. Grout mix shall be submitted to the Engineer for acceptance and shall contain cement, bentonite and water.

4. Surface protection shall be flush with the ground surface in paved or other areas. Surface protection shall consist of a minimum 2-foot-long roadway box with a plain, unmarked locking lid. Roadway boxes shall have a diameter adequate to allow attachment of cable support assembly.

Inclinometer installations outside the right-of-way shall not extend above existing grade.

Deformation Monitoring Points

1. Deformation monitoring points (DMPs) will be used to monitor vertical and/or horizontal deformation of various facilities at selected locations shown on the Plans.

2. The following five types of DMPs shall be used to monitor deformation:

   a. DMP-Type 1 shall consist of a 1½-inch PK-nail driven into an asphalt-covered surface.

   b. DMP-Type 2 shall consist of a 1-inch-long by 5/16-inch diameter punchmarked carriage bolt screwed in a 2-inch-long by 5/16-inch diameter tamp-in anchor. These tamp-in anchors shall typically be drilled and epoxied into vertical surfaces of building foundations.

   c. DMP-Type 3 shall consist of a ½-inch-long by 5/16-inch diameter punchmarked carriage bolt screwed into a 1-inch-long by 5/16-inch diameter tamp-in anchor. These tamp-in anchors shall typically be drilled and epoxied into horizontal concrete and rock surfaces (e.g., sidewalks, granite curbstones).

   d. DMP-Type 4 shall consist of 5-foot length of ¾-inch diameter steel rod and a surface roadway box. Top of rod shall be rounded and punchmarked at its center.

   e. DMP-Type 5 shall consist of an observable point punchmarked on the top horizontal surface of steel sheeting or a soldier pile. The steel surface within 3 inches of the point shall be cleaned by wire brush to permit easy identification of the exact point. The point shall also be clearly identified using fluorescent spray paint adjacent to the point.

C. The Contractor shall furnish portable readout instruments for use during the Contractor's monitoring program. At least two identical readout units shall be furnished for each instrument, the second unit for use during the Engineer's monitoring program.

D. The Contractor shall furnish all installation tools, materials and miscellaneous instrumentation components.

E. Manufacturer of each instrument shall provide an instruction manual which shall include the following:

1. A description of the purpose of instrument.
2. Theory of operation.
3. Step-by-step procedure for:
   a. A pre-installation acceptance test when instruments are received on site, to ensure the instruments are functioning correctly prior to installation.
   b. Calibration of readout units.
4. A list of calibration equipment required and recommended frequency of calibration.
5. Step-by-step instrument installation procedure including materials, tools, spare parts and any borehole requirement, and post-installation acceptance tests.
6. Maintenance procedures for each instrument.
7. Step-by-step data collection procedure for each instrument.
8. Data reduction, processing, plotting and interpretation procedures for each instrument.

F. A factory calibration shall be conducted on all instruments at manufacturer's facility prior to shipment. Each factory calibration shall include a calibration curve with data points clearly indicated and a tabulation of the data. Each instrument shall be marked with a unique identification number.

CONSTRUCTION METHODS

ADD THE FOLLOWING:

148.61 INSPECTION

The Contractor shall keep records of work performed, and verify that gauges, targets, ranges, and other markers are in place and usable for the intended purpose. The Contractor shall furnish boats, boatmen, laborers, and materials necessary for inspecting, supervising, and surveying the work as specified in Section 4.17.

148.62 CONDUCT OF DREDGING WORK

A. The tunnel trench payment lines are the lines and grades, and the bottom width shown on the Plans. The Contractor may dredge to a steeper slope, however, in ledge, the excavated surface shall not encroach within the payment lines shown on the Plans.

B. The Contractor shall perform additional dredging and blasting required at the tunnel element joint locations, as shown on the plans, if Alternate 2, Pumped Sand Foundation, is selected.

C. The Contractor shall schedule and arrange dredging, blasting, and disposal operations so as not to interfere with or hinder, navigation, Port operations, or work of other Contractors. Should it become necessary to shift or move floating equipment, or to interrupt the Contractor's operation to accommodate the movement of vessels and other floating equipment, this shall be done immediately or when directed by the Engineer, and the Contractor will not be entitled to extra compensation.

D. Each night between sunset and sunrise and during periods of restricted visibility, the Contractor shall provide lights for floating plants, pipelines, ranges,

and markers. The Contractor shall also provide lights for buoys that could endanger or obstruct navigation. When night work is in progress, the Contractor shall maintain lights from sunset to sunrise for the observation of dredging operations. Lighting shall conform to United States Coast Guard requirements for visibility and color.

E. The Contractor shall furnish, set, and maintain ranges, buoys, and markers needed to define the work area and to facilitate inspection. The Contractor shall establish and maintain tide board gauges in approved locations. The Contractor shall install and maintain a recording type tide gauge. Electronic ranging and acoustic sounding will also be utilized for dredging control.

F. The Contractor shall maintain the plant, scows, barges, pipelines, and associated equipment to meet the requirements of the work.

G. The Contractor shall conduct a Water Quality Monitoring Plan in accordance with the requirements of the permits noted in Subsection 7.03.

Should allowable water quality levels be exceeded due to Contractor's operations, Contractor will be required to adjust its operations in such a manner that acceptable water quality standards are obtained. Adjustments to Contractor's operations may include, but are not limited to:

1. Dredging with an enclosed bucket clamshell dredge.
2. Reduction in overall dredging rate.
3. Use of silt curtains or similar sedimentation barriers.

4. Prohibition of dragging clamshell bucket across bottom to smooth it before subsequent dredging.
5. Prohibition of overflow from barge.
6. Reduction in speed at which bucket is raised or lowered through the water column.
7. Reduction in dredging during periods of relatively strong ambient transport and mixing (high winds, spring tides, ship traffic, etc.).

Adjustments to Contractor dredging operations in order to comply with permits and/or requirements of the water quality program shall not be cause for increase in Contract price or increase in Contract duration. Silt curtains shall satisfy the requirements specified in the Erosion and Sedimentation Control Plan (Exhibit II-C).

H. The Contractor shall use silt curtains whenever the limits established by the Water Quality Certificate are exceeded and in accordance with Exhibit II-C, Erosion and Sedimentation Control Plan.

I. The Contractor shall use silt curtains when dredging during months of February, March, April and May, and during the period of September 15 through October 15. Silt curtains shall satisfy the requirements specified in Exhibit II-C.

J. The Contractor shall remove fill located below MHW and above native material in South and East Boston by land excavation methods and equipment in accordance with Section 120. Dredging of this material will only be allowed with the authorization of the Engineer.

K. The Contractor may remove native material at BMIP in South Boston and BIF in East Boston by dredging. However, material removed from South Boston must be brought ashore and transported to the South Boston

Processing Facility. Similarly, material removed from East Boston must be transported to Governor's Island. Material destined for the South Boston Processing Facility must be brought ashore in South Boston. Should new facilities be required to bring material ashore in South Boston, Contractor shall obtain all necessary permits required for the construction of these facilities. The cost of these facilities and permits shall be included in the unit price bid for the work of this Section.

L. Contractor must dispose of Harbor Sediments at Governor's Island in East Boston. Harbor Sediments are to be taken ashore within the right-of-way adjacent the excavation support system in East Boston. Silt curtains shall be used around the off loading barges at all times. Should Contractor elect to construct new facilities to take material ashore, Contractor shall obtain all necessary permits required for the construction of these facilities. The cost of these facilities and permits shall be included in the unit price bid for the work for this Section. Harbor sediments shall be removed prior to dredging other material in the harbor.

M. Contractor shall install and maintain silt curtain around General Ship's intake located at the northwest corner of Pier 5 prior to commencement of dredging and shall not remove silt curtain until backfilling is completed.

N. All rock removed from the harbor shall be either reused by the Contractor or transported to, and disposed of, at the Massachusetts Bay Disposal Site.

148.63 SEQUENCE OF OPERATIONS

Dredging of the tunnel trench shall proceed in a manner to accommodate the placing of tunnel elements in accordance with the requirements specified in Section 961 and Section 8.03.

148.64 LIMITATIONS ON DREDGING IN ADVANCE OF PLACING PREFABRICATED TUNNEL ELEMENTS

The Contractor shall be responsible for maintaining the dredged trench as specified hereinafter. The Contractor is cautioned that an open trench may produce changes in the density of the water which may affect the buoyancy of the tunnel elements.

148.66 TEST BLAST PROGRAM

A. A test blast program shall be conducted by the Contractor, consisting of at least six individual test blasts prior to commencement of full scale production blasting. The purpose of the test program is to allow the Contractor to establish safe limits of vibration. The test blast program shall be conducted and reported in strict accordance with procedures outlined in the sections of these specifications covering blasting methods and vibration control.

B. No test blasting shall be started until after the locations, for the individual test blasts have been reviewed and approved by the Engineer.

C. The test event shall begin with a small number of charges and extend upward to the maximum yield to be used. The final test event shall simulate, as close as practicable, the explosive charge type, size, overlying water depth, charge concentration, charge separation, initiation methods, and implacement conditions anticipated for the largest detonations. One copy of the record for the test blasts shall be submitted in tabular form to the Engineer.

D. After the series of test blasts, the Contractor shall examine the representative structures of the preblast

survey as previously specified. Any new damage resulting from the test blasting shall be photographed and reported in detail to the Engineer.

E. At the conclusion of the test blast program, the Contractor shall examine all reports, surveys, test data, and other pertinent information; the conclusions reached shall be the basis for developing a completely engineered Blasting Plan. The procedure shall include sketches showing blasting patterns, weights and explosives, wiring, and charge emplacement. Copies of the developed procedure shall be submitted for review to the Engineer and upon completion of the review and acceptance, it shall be appended to, and become a part of, the aforementioned Blasting Plan. A maximum period of 21 calendar days will be required for review and acceptance by the Engineer. Such review period shall not be the basis for a claim for delay. In no event shall operational blasting proceed until the developed procedure for blasting has been reviewed and accepted by the Engineer. If the procedure is not acceptable, the contractor should revise and resubmit the procedure. The Engineer shall have 10 days for review and acceptance of all revised procedures.

148.67 BLASTING METHODS AND PROCEDURES

A. General: The Contractor shall take appropriate measures for avoiding blast damage which shall include, but are not limited to:

1. Choosing a suitable ignition pattern with millisecond delay detonators to minimize the instantaneous impulse.

2. Taking precautions to avoid flashover which shall include the following measures, unless otherwise allowed by the Engineer:

a. Keeping the top of the hole uncharged for a depth equal to at least one-half the burden width.

b. Using low sensitivity explosives in the entire pattern or loading the holes alternatively with high and low sensitivity explosives.

c. Inspecting the ignition system using ground fault testing.

3. Only Class B explosives shall be used by the Contractor, except that Class A explosives will be allowed for blasting caps only.

4. Storage facilities for explosives shall be constructed, as a minimum, to conform to Type 2, Storage Facilities as specified in Part 181 of Title 26, Code of Federal Regulation, listed in the above references, Subpart J, which includes requirements for hinges and hasps, and the locking system. The Contractor shall be responsible for obtaining storage facilities and coordinating transportation routes and obtaining all necessary permits therefor.

5. The amount of explosives permitted aboard the drill boat at any one time will be subject to the approval of the Engineer, but in no case shall such amount exceed that required by the Contractor for one day's operations. The Contractor will be required to return all explosives remaining on the drill boat or barge at the end of the day to the storage facility.

6. Only detonating fuses which are insensitive to external shock and friction are allowed.

B. Existing Conditions:

Contractors are expected to examine the site of the work, cores and logs, and after investigation, decide for themselves the character of materials and make their bids accordingly. The Engineer assumes no responsibility for the types of material encountered, nor does it guarantee that other materials will not be encountered in performance of the work. The removal cost of such other materials shall be included in the Bid Prices.

C. Blasting Control:

1. Submittals: The Contractor shall submit a weekly blasting operation schedule to the Engineer. This schedule shall be provided seven (7) days prior to commencement of blasting. On a weekly basis, the Contractor shall submit, in tabular form, a record for each blast which shall consist of date, time and location of blast, amount of explosives used, peak particle velocity, and all other data necessary to adequately control blasting operations. See Figure 148-1 for minimum content of the weekly blasting record (a copy is attached to this Special Provision). A memorandum or telephone report on vibration intensity shall be submitted within 24 hours when specifically requested by the Engineer or without request when such intensity exceeds a peak particle velocity of 1.5 inches per second at any structure.

2. The vibration specialist shall adopt appropriate measures for blast damage reduction and shall be fully involved in a design of the test blasting and monitoring program and the final production blasting and monitoring program. Twenty-one days shall be allowed for the Engineer to review

and accept the final blasting plan. The vibration specialist shall be retained throughout the operational program to provide and verify round-by-round blasting records. Location of blast monitoring instruments shall be selected by the Contractor and are to be approved by the Engineer.

3. Millisecond delay caps shall be used on all blasting work.

4. Blasting shall be controlled in such a manner that the maximum ground vibration level at any structure shall not exceed a zero-to-peak particle velocity of 1.9 inches per second. The instrumentation shall record all three components (vertical, longitudinal, and transverse with respect to the location of the blast) of particle velocity direct (or shall have sufficient resolution of acceleration or displacement such that particle velocity can be readily and accurately determined from the record). The instantaneous vector sum of the three directional components of vibration will be used to compute the maximum vibration level.

5. Blasting shall be controlled such that the maximum water overpressure is 15 pounds per square inch at nearest underwater structure. The instrumentation shall record dynamic water pressure and frequency of underwater shock waves. Transducers shall be suspended in the water adjacent to and directly in front of the underwater structure being monitored.

6. Explosives will be contained within the drill holes using care to prevent spillage.

D. Safety: The Contractor shall take all reasonable precautions for protection of individuals and property. Such precautions shall include, but are not limited to:

1. The Contractor shall take all necessary precautions to prevent damage to any vessel (moored or under-way), structures or property, and preserve the crew or occupants thereof from exposure to injury as a result of his operations. No blasting or dredging will be permitted when LNG and/or oil tankers enter the harbor.

2. The Contractor shall take all precautions necessary to warn and protect any swimmers, boaters, or other individuals in the water, prior to any blasting; also, coordinate operations with General Ship Corporation personnel to avoid injury to underwater divers.

3. Transport of explosives and detonators shall be in vehicles suitably grounded and protected from lightning strikes and electrical storm phenomena, in accordance with federal and state requirements, and to the satisfaction of the Engineer.

4. No explosive material shall be handled, transported, or in any way made use of, during any period of electrical storm, of lightning or other electrical phenomenon. In the event that any such condition should appear imminent or occur, or if some known leakage of electricity should occur in the neighborhood of, or in the work area while the transport, handling, making up, charging, or such like use of explosives is being effected, then the work area shall be evacuated and abandoned completely until at least 30 minutes after the condition has ceased or the leakage stopped. The Engineer will be notified prior to any blasting or loading operation so that stationary or mobile radio transmission is not made on the site.

5. The handling, storage, and use of explosives shall be governed by the applicable provisions of the Section on "Blasting" of the Corps of Engineers Manual, EM-385-1-1, dated April 1981, entitled, "Safety and Health Requirements Manual", as amended, referred to in Clause 56, "Accident Prevention". In addition, the Contractor shall make necessary arrangements as may be required by the applicable U.S. Coast Guard, State, County, Municipal or Massachusetts Port Authority codes, rules, regulations and laws, and shall be responsible for compliance therewith, including storage of explosives. All handling, use, and storage of explosives will be under the personal supervision of a Licensed Blaster. No blasting is permitted when visibility is less than 1,500 feet in fog or rain, and between beginning of evening nautical twilight and ending of morning nautical twilight or when a vessel is within 1,500 feet of the blast.

6. A warning whistle shall be sounded prior to any blast.

148.68 WORK RESTRICTIONS

A. To reduce impacts to fish, the Contractor will be required to schedule work as follows:

1. No blasting will be permitted during periods of dead slack water.

2. Blasting will be minimized during peak fish runs. During these periods, consistent with all safety requirements, the Engineer may order a temporary halt to blasting operations in the event that a peak fish run is detected in the vicinity or appears imminent.

B. Unless specifically approved by the Department, blasting will not be allowed during the following periods:

- April 1 through June 15
- September 15 to October 15

C. No blasting will be permitted within 600 feet of an in-place tube section.

D. No blasted rock shall protrude above pre-construction harbor bottom levels. Contractor shall conduct soundings at regular intervals during progress of the blasting work and furnish data to the Engineer. Should data indicate protrusion of rock above pre-construction levels, contractor shall remove all such rock at no increase in contract cost or contract duration.

148.70 UNAUTHORIZED TUNNEL TRENCH EXCAVATION

Should the trench be dredged beyond the indicated grades, side slopes and depth shown on the plans without authorization or should contractor's construction methods create unsuitable foundation conditions, the additional excavation, the additional foundation course material or tremie concrete (as directed by the Engineer), additional backfill and locking backfill will not be considered for payment.

148.71 AUTHORIZED ADDITIONAL TUNNEL TRENCH EXCAVATION

Should unsuitable or unstable materials be discovered at or below the bottom elevations or side slopes shown on the plans, the Contractor shall immediately notify the Engineer in writing. Upon written direction from the Engineer, the Contractor shall then remove such unsuitable or unstable materials to such additional depth, and to such slopes as the Engineer may direct in writing. Payment for

any authorized additional tunnel trench excavation will be at the Contract unit price. The space shall be filled with the applicable backfill course, as specified in Section 490 herein, or as directed in writing by the Engineer. Soundings shall be taken before and after such additional trench excavation.

148.72 MAINTENANCE OF TUNNEL TRENCH

A. The Contractor shall maintain the bottom dimensions of the trench, and the trench side slopes until the backfill materials have been placed to the required elevations. After the dredging of any area has been completed to the required lines and grades, silt and other material that has entered the dredged trench shall be removed by redredging. The trench shall be fine dredged immediately prior to placing of the foundation course for the tunnel elements, if the Contractor is using the screeded gravel foundation. The trench shall be fine dredged immediately prior to placing tunnel elements if the Contractor is using the pumped sand foundation. Silt and other material that have accumulated on top of the foundation course shall be removed immediately prior to placing of tunnel elements. There will be no additional payment for redredging or fine dredging required for maintaining the dredged trench, or replacing the foundation to the prescribed grades.

B. The Contractor shall make provisions for the removal of silt or other unsuitable materials under the tunnel prior to installing foundation by the pumped sand method.

C. The Contractor shall remove and dispose of any buoyant material or debris which dislodges from the trench slopes.

148.73 DISPOSAL OF DREDGED MATERIALS

A. The disposal of dredged materials in unauthorized places is prohibited.

B. For purposes of disposal the harbor lines are defined as a vertical plane through the line where the dikes in East and South Boston intersect the MHW line (104.5 feet).

C. For materials dredged from the harbor, other than rock and harbor sediments, the Contractor shall safely transport to and dispose of the materials at the Massachusetts Bay Disposal Site.

D. Native materials dredged from Boston Marine Industrial Park (BMIP) and Bird Island Flats (BIF) and landward of the above-defined harbor lines shall be transported to and disposed of at the South Boston Processing Facility for material removed from BMIP, and Governor's Island for material removed from BIF.

E. The Contractor may reuse the blasted rock removed from the harbor, or transport it and dispose of it at the Massachusetts Bay Disposal Site.

F. The Contractor shall deposit dredged material by hopper dredge or self-dumping scow or barge. The Contractor shall not remove loaded or partially loaded scows, barges, or hopper dredges from the dredge area until the Engineer has been notified. The Contractor will notify the Engineer when scows or barges are returned to the dredge area.

148.74 NAVIGATION WARNINGS

The Contractor shall furnish, install, and maintain navigation warning signs on all floating equipment as directed by the Engineer and U.S. Coast Guard.

148.75 SALVAGED MATERIAL

Anchors, chains, firearms, and other articles of possible historical or archeological value brought to the surface during dredging operations shall become the property of the Department and shall be deposited on shore at a convenient location near the site of the work, as directed by the Engineer.

148.76 SAFETY OF STRUCTURES

The Contractor shall maintain the stability of piers, dikes, bulkheads, and other structures lying on or adjacent to the site of the work, insofar as structures may be jeopardized by dredging operations. The Contractor shall repair damage resulting from dredging operations, insofar as such damage may be caused by variation in locations or depth of dredging, or both, from that indicated or permitted under the Contract.

148.77 PLANT REMOVAL

Upon completion of the work, the Contractor shall promptly remove plant, including ranges, buoys, piles, and other markers or obstructions.

148.78 INSTRUMENTATION

A. Quantities and approximate locations of all instruments to be installed by the Contractor are shown on the Plans. Exact locations will be determined in the field, by the Engineer in cooperation with the Contractor, to minimize interference to other construction work. The Contractor will be responsible for monitoring all instrumentation, including that installed by the Management Consultant.

B. The Geotechnical Specialist shall install following guidelines included in the manufacturer's installation

manuals and as detailed on the approved submittals, monitor, and interpret data from instrumentation, in addition to that specified herein, that the Contractor deems necessary to ensure the safety of personnel and the work. Raw data collected by the Contractor from any such additional instrumentation shall be collected in the same manner as for the specified instrumentation. Raw, reduced and plotted data shall be made available to the Engineer within 24 hours of reading. When readings indicate ground and/or structure movement, the Engineer shall be notified immediately.

C. Inclinometers shall be installed at the locations and depths shown on the Plans, generally as follows. After installation, the bottom 10 feet of inclinometer casing shall be within a stratum suitable for providing base fixity, such as bedrock or glacial till.

1. Plumb the drill rig carefully. Using a wash boring or rotary drilling method, install HW flush-joint casing to the specified depth of the bottom cap, plus any additional depth needed to accommodate any required bottom weight. If drilling in bedrock is required, the boring in bedrock shall be 3.75 inches minimum diameter. Take a sample of the material assumed to provide base fixity. Wash until the water runs clear. Maximize cutting removal by using the reverse circulation method, with the wash pipe as the intake, its lower end a few inches from the bottom of the borehole.

2. If the boring extends into bedrock, verify that grout will not run into the bedrock by using the following method. Add drill casing so that the top is 10 feet above the ground surface. Fill the drill casing with water, and observe the level. If the level remains at the top of the casing for five

minutes, proceed with Step 3. If the level falls, tremie special grout Type B into the bottom 10 feet of the borehole, redrill, regrout and redrill as necessary until, with the water-filled casing 10 feet above the ground surface and the borehole drilled 10 feet into bedrock, water remains at the top of the casing for five minutes.

3. Install the bottom cap on the inclinometer casing. Verify that the drill casing is free to move. Using a tremie method, fill the drill casing with special grout Type B.

4. Add sufficient weight to the bottom of the inclinometer casing to overcome buoyancy caused by the grout, and lower coupled inclinometer casing throughout the borehole, filling with water, sealing joints to prevent grout ingress, and maintaining required groove orientation.

5. When all inclinometer casing is installed, withdraw drill casing without rotation, and top up with special grout Type B.

6. Perform post-installation acceptance test by verifying that groove orientation is correct and that the inclinometer probe tracks correctly in all four orientations.

7. Flush inclinometer casing with clean water. Allow grout to set. Repeat flushing and post-installation acceptance test.

8. Install surface protection.

9. Determine as-built location in horizontal position to an accuracy of ±0.03 foot, and in elevation to an accuracy of ±0.01 foot. The point selected to determine horizontal position shall be indicated on the installation record sheet.

D. Deformation monitoring points (DMPs) shall be installed at the locations shown on the Plans, generally as described below. After installation of a DMP, determine as-built location in horizontal position to an accuracy of ±0.03 foot, and in elevation to an accuracy of ±0.01 foot.

1. DMP-Type 1 shall be driven with a hammer into asphalt-covered surfaces.

2. DMP-Type 2 shall be set in epoxy grout in holes drilled into vertical surfaces of building foundations.

3. DMP-Type 3 set in epoxy grout in holes drilled into horizontal concrete and rock surfaces.

4. DMP-Type 4 shall be installed by excavating a hole adequate for the roadway box, driving the rod to the required depth, and installing the roadway box. If the rod cannot be driven to the required depth, it shall be withdrawn, and reinstalled by advancing a borehole to the full depth of the rod, and grouting the annulus with cement grout.

5. DMP-Type 5 shall be installed on the top horizontal surface of steel sheeting or a solider pile. The steel surface within 3 inches of the point shall be cleaned by wire brush to permit easy identification of the exact point. The point shall also be clearly identified using fluorescent spray paint adjacent to the point.

E. Inclinometer readings shall be made in accordance with the manufacturer's instruction manual. An inclinometer reading is defined as a set of readings at 2 feet intervals throughout the casing, and a second set at 180 degrees to the first set. A formal initial inclinometer reading shall consist of the average of three

readings as defined above, involving six complete traverses along the casing. A previous or subsequent reading shall be a single reading. Check-sums (sum of two readings 180 degrees apart, at each depth) shall be examined in the field, and shall remain within +20 readout units of the mean of all check-sums for that reading.

F. A formal initial set of readings on a Deformation Monitoring Point (DMP) shall consist of the average of two readings of DMP location in both plan and elevation, using surveying methods. A previous or subsequent reading shall consist of a single set of readings of DMP location in both plan and elevation. all elevation readings shall be referenced to deep benchmark, and all readings of plan position shall be referenced to stable horizontal control stations. Reading accuracy for elevation shall be ±0.01 foot. Reading accuracy for plan position shall be ±0.03 foot.

G. The Contractor shall protect all instruments and appurtenant fixtures, leads, connections, and other components of instrumentation systems from damage due to construction operations, weather, traffic, and vandalism. All instrumentation materials, after receipt at the site and prior to installation, shall be stored in an indoor clean, dry and secure storage space.

H. The Contractor shall not disclose any instrumentation data to third parties and shall not publish data without prior approval of the Department.

I. Contractor shall perform weekly readings during construction until completion and submit data in hard copy and electronic format acceptable to the Engineer.

J. The Contractor shall remove all instrumentation at the completion of the project or during construction as directed by the Engineer.

K. The geotechnical engineering specialist retained by the Contractor assigned to furnish, install, maintain and calibrate instrumentation, and to conduct the Contractor's monitoring program, shall have at least five years of experience in installation and monitoring of the types of instruments specified herein.

The geotechnical engineering specialist shall:

1. Prepare detailed procedures for all instruments specified herein, for factory calibration, pre-installation acceptance tests, installation, post-installation acceptance tests, field calibration, collection of initial data, collection of subsequent data, data reduction, processing, plotting, interpreting and reporting, protection from damage, and maintenance.

2. Review and sign all submittals.

3. Be on site and supervise at least the first two installations of each type of instrument.

4. Conduct at least the first two activities of each of the following tasks for each instrument specified herein: pre-installation acceptance tests, post-installation acceptance tests, field calibration, data collection, reduction, processing, plotting, interpreting.

L. A factory calibration shall be conducted on all instruments at the manufacturer's facility prior to shipment.

M. Manufacturer shall provide the warranty for each portable readout unit furnished for the Engineer's monitoring program.

N. When instruments are received at the site, the geotechnical engineering specialist shall make pre-installation acceptance tests to ensure that the instruments are functioning correctly prior to installation. Pre-installation acceptance tests shall follow the guidelines included in the manufacturers' instruction manuals, and as detailed in the approved submittal.

O. Whenever withdrawing drill casing or augers during instrument installation in a borehole, care shall be taken to minimize the increments and rate of casing or auger withdrawal so that collapse of the borehole does not occur and to ensure that backfill material does not build up inside the casing or auger such that the instrument is lifted as the casing or auger is withdrawn. The casing or auger shall be withdrawn without rotation. The casing or auger may be omitted only where it can be shown to the satisfaction of the Engineer that instrument installation without the casing or auger will not cause collapse of the borehole or in any way adversely affect instrument installation.

P. The geotechnical engineering specialist shall conduct regular field calibrations and maintenance of readout units used for the Contractor's monitoring program, and regular maintenance of field terminals and accessible instrument components, following the guidelines included in the manufacturers' instruction manuals, and as detailed in the approved submittal. The Engineer will be responsible for the regular calibration and maintenance of readout units used for the Engineer's monitoring program.

Q. Data shall be recorded on the approved forms. Field data records shall include at least the following:

- project name
- instrument type

- date and time
- observer
- readout unit number
- instrument number
- readings
- remarks
- visual observations
- other causal data including weather, temperature, and construction activities

R. A formal initial piezometer reading shall consist of the average of three readings with the water level indicator. A previous or subsequent reading shall be a single reading with the water level indicator. Reading accuracy shall be ±0.05 foot.

COMPENSATION

148.80 METHOD OF MEASUREMENT

DELETE entire section and replace with the following:

A. The quantity of dredged material for payment is the computed quantity up to the payment lines shown on the Plans, not including any volume of rock and ledge. The payment lines represent a maximum limit. Should Contractor dredge to a steeper slope, the Contractor will be paid only for the quantity actually removed.

B. The quantity of ledge removed is the volume between the actual surface of the ledge and the maximum payment lines as shown on the Plans. Should Contractor dredge to a steeper slope, the Contractor will be paid only for the quantity actually removed.

C. The cost of mobilizing and demobilizing dredging plant will not be paid for separately, but the cost

thereof shall be included in the appropriate unit price bid item of this Section.

D. The Engineer will review drill holes before blasting to determine actual ledge elevations. Plan quantities will be revised if drill holes indicate a top of ledge different than shown on the Plans.

E. Development and compliance with the Blasting Plan, compliance with the Water Quality Monitoring Plan, the Erosion and Sediment Control Plan and regulatory requirements are considered incidental to the work and will not be measured for payment.

F. Additional dredging and ledge removal required for construction of the cofferdam in South Boston, as specified in Section 140.160, shall be included in Bid Item 140.1.

G. Instrumentation is considered incidental to the work and will not be measured for payment.

H. Engineer will review soundings furnished by the Contractor to determine the actual volume of materials removed.

148.82 Payment Items

148.01	Dredging (Alt. 1)	CY
148.02	Dredging (Alt. 2)	CY
148.31	Removal and Disposal of Ledge (Alt. 1)	CY
148.32	Removal and Disposal of Ledge (Alt. 2)	CY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff v. DUTRA CONSTRUCTION CO., INC., Defendant	CIVIL ACTION NO. 95-11040-RCL

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR REHEARING

Now comes the defendant, Dutra Construction Co., Inc. and moves the Court to deny the plaintiff's Motion for Rehearing. The plaintiff seeks relief from the Court's interlocutory order granting the Defendant's motion for summary judgment on the Jones Act Count. For the reasons set forth below, the plaintiff is not deserving of a rehearing.

I. PROCEDURAL HISTORY

The defendant adopts the procedural history as set forth in the plaintiff's motion and adds the following. Lengthy memorandums of law were filed by both parties in support of their respective positions as regards the defendant's motion for summary judgment. The Court's decision granting the defendant's motion on Counts I and II but denying the motion on Count III was entered in the docket on March 29, 1999.

Notice of Appeal was filed by the plaintiff on April 19, 1999. On May 20, 1999 the plaintiff filed a Motion to Stay

Trial Pending Appeal. The Motion to Stay was opposed by the defendant and denied by the Court on June 17, 1999. Pretrial conference and trial dates were scheduled by the Court, but continued.

Notice of appearances have been filed by both parties in the United States Court of Appeal for the First Circuit ("Appeals Court"). The Designation of Contents of Appendix have been filed. The Appeals Court has ordered the parties to attend a Pre-Argument Settlement Conference on November 10, 1999. The appellant now has until December 10, 1999 to file his brief and appendix.

A. THE COURT DOES NOT HAVE JURISDICTION TO HEAR PLAINTIFF'S MOTION FOR REHEARING.

The plaintiff cites *Moore's Federal Practice* in support of his argument that the Court has jurisdiction to both hear the motion and modify the underlying interlocutory order. Perhaps a closer perusal of Moore's was in order.

"It is often said that filing a timely notice of appeal immediately transfers jurisdiction to the circuit court and divests court of jurisdiction over all matters relating to the appeal." 20 *Moore's Federal Practice,* §303.32[1] (3rd ed. 1999)

> The general rule is that a district court is divested of jurisdiction on filing of notice of appeal with respect to any matters involved in the appeal; however, where an appeal is allowed from an interlocutory order, the district court may still proceed with the matters not involved in the appeal. *Taylor v. Sterrett,* 640 F2d 663 (C.A.5) 1981.

"It is a judge made doctrine, designed to promote judicial economy and avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time." *Id.* "After a notice of appeal is timely filed, the district court cannot take any action that would 'alter the status of the case as it rests before the circuit court,'" *Id.* at §303.32[2][a] citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982).

It helps the plaintiff not to argue that the appeal in the present action is interlocutory in nature. "The filing of a timely and effective notice of appeal diverts the district court of jurisdiction only with respect to the judgment brought up for review by the appeal." *Id.* at §303.32[2][b][v].

"A party who wishes to stop all proceedings in the district court pending an appeal from a judgment that does not fully dispose of the action should request a stay in the district court." *Id.* The plaintiff has already attempted to obtain a stay, which was denied by the Court. Because of that denial the plaintiff now seeks further relief by choosing an avenue not available.

It should be kept in mind that the plaintiff chose to appeal the interlocutory decision. 28 U.S.C. §1292(a)(3) gives the plaintiff the right of appeal but does not require that the plaintiff do so. "No rights are waived by not appealing from an interlocutory order when appeal is available, and all will be reserved for review in an appeal from the final judgment." *Id.* at §710.05[2][c]. It is reiterated in Moore's chapter on Admiralty Appeals that "the commencement of an interlocutory appeal by one party does not prevent the district court from proceeding *with other aspects* of the case." *Id.* (emphasis added).

The plaintiff's reference to *Wanamaker v. Columbian Rope Co.*, 907 F.Supp. 522 (2nd Cir. 1997) serves only to cloud the pertinent issues. The trial court in *Wanamaker* decided to revisit interlocutory decisions which had *not* been appealed. Thus, no jurisdictional conflicts existed. The case of *Commonwealth of Puerto Rico v. The S.S. Zoe Colocotroni* cited by the plaintiff is also inapplicable. That case involves a Rule 60(b) Motion after a final judgment and not an interlocutory appeal.

B. THERE ARE NO GROUNDS TO REVERSE THE COURT'S PRIOR DECISION

"Plaintiff's motion for rehearing is really a motion for reconsideration. The plaintiff has set forth fourteen pages of substantive argument. There will be nothing more to add at a second hearing not contained in the plaintiff's brief.

The plaintiff asks this Court not to treat his motion as a Rule 60(b) Motion for obvious reasons. Under Rule. 60(b) relief from judgment is warranted in limited circumstances. None of which are applicable here. There was no fraud, mistake or surprise. The plaintiff was represented by competent and experienced counsel. There is no newly discovered evidence.

A motion to reconsider an interlocutory order is not governed by Rule 60(b). It should be allowed only if justice so requires. It does not.

II. ARGUMENT

Although plaintiff's successor counsel would like to convince the court otherwise, the arguments made in his

motion for rehearing were previously addressed by the parties. There are no new issues raised which have not already been considered by the Court. The same issues, whether disputed or not, are rehashed. As before, there is no dispute that the plaintiff met the first two prongs of the test to establish seaman status. The plaintiff contributed to the function of the dredge and had a substantial attachment to it. The issue remains whether the Superscoop is a vessel.

After a thorough analysis of the *DiGiovanni* case, which as plaintiff concedes the Court is bound to follow the Court concluded the Superscoop was not a vessel. The plaintiff has come forth with no novel arguments that would compel the Court to reverse its decision made seven months ago. The Court's decision was based on sound reasoning and supported by the law in the First Circuit: Simply, dredging is not navigation or commerce. The Superscoop was designed and built for dredging. At the time the plaintiff was injured the Superscoop was not in navigation or transit.

The defendant refers to and again relies upon its detailed memorandi of law filed with its motions for summary judgment. The defendant will, however, address certain of the plaintiff's arguments.

A. <u>THE SUPERSCOOP IS A BARGE AND NOT A VESSEL</u>

The plaintiff attempts to distinguish *DiGiovanni* because the Court used the phrase "barges or other floats". The plaintiff goes on to argue that the Superscoop is a special purpose vessel and thus not a barge or other float. The plaintiff cites no First Circuit cases describing dredges

as being special purpose vessels. The plaintiff also interprets *DiGiovanni* too narrowly and fails to acknowledge the common meaning of the term used by the Court. By using the phrase "barges or other floats" the *DiGovanni* court was being expansive and not restrictive.

> Webster's Dictionary describes a *barge* as a roomy usually flat-bottomed boat used chiefly for the transport of goods on inland waterways and usually propelled by towing.
>
> Webster's provides the following definition for *dredge:* "a barge used in dredging". *Webster's Ninth New Collegiate Dictionary* Merriam-Webster (1983)

While all barges are not dredges, clearly all dredges are barges. Even if a dredge were somehow not a barge, it would fall within in the definition "other float."

Many of the "vessel like" characteristics listed by the plaintiff are shared by both the Betty F in *DiGiovanni* and the Superscoop. The characteristics are not relevant unless they assist in answering the question what is the primary purpose of the Superscoop.

The plaintiff cites one First Circuit case for the proposition that all dredges are Jones Act vessels. The case cited, *Gahagan Construction Corp. v. Armao,* 165 F2d 301 (1st Cir. 1948) did not address the issue whether the dredge was or was not a vessel. The *Gahagan* court was only asked to decide if the dredge was in navigable waters at the time of the accident. Decided forty-four years prior to *DiGovanni,* the *Gahagan* case can not be expected to shed any helpful light whether the Superscoop is a Jones Act vessel within the formula established by the First Circuit in 1992.

The plaintiff has attempted various means of circumventing the *DiGiovanni* case. The latest attempt is to convince the court that the Superscoop should not be put to the test because it is so clearly a vessel. The opposite is true. The Superscoop fails the vessel test as established. The Superscoop's use was not navigation based. Rather, it was used to stand as a float for the bucket crane that dug out the harbor tunnel. Greater, the Superscoop's use was, alternatively, dredging and simply as a work platform. The facts show that the dredge did not move in a controlled or navigable fashion, or by propulsion. Its infrequent movement was limited to short distances.

The plaintiff also argues that the primary purpose of a dredge is navigation and commerce. Not so. The primary purpose is dredging. The *DiGiovanni* looked for a definition of navigation and found one in *Bernard v. Binnings Construction Co.* 741 F2d 824 (5th Circuit, 1984) cited at *DiGiovanni* p. 1123: "The test is whether it was designed or used primarily for the transportation of cargo, equipment or persons across navigable waters." The Superscoop's primary purpose and the reason for which it was built was to float while firmly attached to the sea floor as a platform from which its crane and bucket dredged.

When the dredging took the Superscoop close to shore, as it did while creating the Ted Williams Tunnel, it was "shore side." This shore side purpose was no different than the shore side purpose of the Betty F in *DiGiovanni.*

B. <u>THE PLAINTIFF WAS NOT ATTACHED TO THE SCOW AND THE SCOW WAS NOT IN TRANSIT</u>

Belatedly the plaintiff makes his final argument: that he was a member of a fleet of vessels under common ownership or control. The so called fleet consisted of two scows and the Superscoop. The scow he was on when injured was in actual transit at the time.

This theory has several major holes. The fleet doctrine allows one to obtain seaman status through the permanent assignment to a group of vessels under common ownership or control. See, *Gizoni v. Southwest Marine Inc.* 56 F3d 1138 (9th Cir. 1995). The fleet doctrine is an exception to the rule that the seaman must have a permanent connection to a particular vessel. It affords protection to a seaman whose duties divide him regularly among vessels. An example is the seaman in *Chandris v. Latsis* 115 S.Ct. 2172 (1995). In *Chandris,* the plaintiff worked on any one of six passengers cruise ships owned by the defendant.

Willard Stewart spent 99 and 9/10s of his time aboard the SuperScoop (see plaintiff's brief). Other than going on board the scow to assist the CAT engineer on the morning of his accident, there is no evidence that he was ever on board either scow. By his own admission, even if all his remaining work time was divided between the two scows, it would equal 1/20 of one percent.

Once again the omniscient *DiGiovanni* decision is of assistance. The plaintiff in *DiGiovanni* was injured while standing on the deck of a supply barge. "The supply barge was in general use to carry supplies, but also served as a

work platform." *Id.* at 1121. The Court rejected the suggestion that the supply barge could serve as the vessel in navigation. The Court held that the plaintiff was not "assigned permanently to the supply barge." *Id.* at 1124. The Court added: "Whether plaintiff is to be considered a seaman must depend upon Betty F". *Id.*

Mr. Stewart's connection to and work upon the scow is considerably less than the connection Mr. DiGiovanni had with the supply barge.

The defendant also disputes whether at the time he was injured the scow was in actual transit. The scow was being held to the side of the Superscoop by the crane and bucket. It was maneuvered by the crane operator and pulled into the side of the Superscoop. When the scow and the barge came together, there was a bump causing the plaintiff to fall.

As stated previously, the plaintiff's connection is not to the scow but to the Superscoop. There is no dispute that the Superscoop was stationary at the time of the accident.

The movement of the scow a short distance along the side of the Superscoop while being held by the bucket is not "actual navigation or transit" without the meaning of the rule in *DiGiovanni*. The scow was connected to the Superscoop and was not transporting anything at the time. It is established that mere floating is not enough to establish a vessel in navigation. See: *Bernard v Binnings Construction Co.* 741 Fd 824 (5th Cir. 1984). Maneuvering the scow such a short distance is more akin to floating than transit.

III. CONCLUSION

For the foregoing reasons the plaintiff is not entitled to a rehearing.

By its attorneys,

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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., do hereby certify that I have this 26th day of October, 1999, served a copy of the foregoing upon all counsel of record by mailing same postage prepaid to:

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